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This Book Entitled, *The Orphans
Legacy*, written by *John Godolphin*
LL. Dr. I do LICENSE to be
Printed,

Exeter house 26. April.
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G-10-85

THE
Orphans Legacy :
OR,
A Testamentary Abridgement.

In Three PARTS.

- I. Of Last Wills and Testaments.
II. Of Executors and Administrators.
III. Of Legacies and Devises.



WHEREIN

The most Material Points of Law, relating to that Subject, are succinctly Treated, as well according to the Common and Temporal, as Ecclesiastical and Civil Laws of this Realm.

ILLUSTRATED

With great variety of select Cases in the Law of both Professions, as well delightful in the Theorie, as useful for the Practice of all such as study the one, or are either Active or Passive in the other.

By *John Godolphin* LL. D^r.

Hebr. Chap. 9. V. 16, and 17.

*Where a Testament is, there must also of necessity be the death of the Testator.
For a Testament is of force after men are dead: otherwise it is of no strength at all whilst the Testator liveth.*

LONDON, Printed by E. T. and R. H. and are to be sold
by *Joseph Nevill* at the sign of the Grey-bound in St. Pauls Church-yard; And *Christopher Wilkinson* at the Black Boy, over
against St. Dunstons Church in Fleet-street, 1674.

THE Orphans' Legacy: A Testamentary Arrangement



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By John Gough, Esq.

1691/45

There is a copy of this work in the hands of the
the Library of the House of Commons

LONDON: Printed by T. W. and W. R. and are to be
by Joseph Aitken at the sign of the Green Dragon in St. Paul's Church
yard: And Christopher Widdows at the Black Boy over
against St. Dunstons Church in Fleet-street, 1745.

To the Right Honourable, ANTHONY
Earl of SHAFTESBURY, Baron ASH-
LEY of WINBURN St Gyles, and
Baron COOPER of PAWLET, Lord
Lieutenant of DORSET-SHIRE,
Lord High CHANCELLOR of
ENGLAND, and one of His MAJE-
STIES most Honourable PRIVY
COUNCIL, &c.

My Lord,

BEfore this Treatise Presumes to
hazard it self in the Readers
hands, its highest Ambition is
to lye at Your Honours Feet.
What in the like Case was once said to a Per-
son of Grandeur, Qui apud te audent di-
cere, Magnitudinem tuam ignorant; qui
non audent, Humanitatem, is my Apology
for this Loyal Confidence. Were not the
Scales of Justice in Your hands; or were
the Tribunal, which You Illustrate, under
a Cloud for want of a Luminary to en-
lighten

The Epistle Dedicatory.

*lighten the Law; yet such is the Conquest
Your Victorious Condescensions have
made on all not-disingenuous hearts; Such
Your exact Inspection into Men and Man-
ners; Such Your depth of Just and Success-
full Counsels; Such Your serious Recrea-
tion in the more Noble Arts and Sciences;
Such Your Dexterity in Reconciling Law
to Equity, by Your Great Prudence in the
Conduct of Juridical Contestations; and All
under the immediate Umbrage of Majesty;
That the Insignificant Author, doubting the
Euroclydons of a Censorious Age, and Am-
bitious of his Obligations to Your Lord-
ship, humbly Craves Your Pardon for pre-
suming to take Sanctuary under Your Pro-
tection of Equity, in case this ORPHANS
LEGACY proves not so Good in Law,
as in the most Critical Construction may In-
demnifie,*

MY LORD,

Your most Obedient Servant, Devoted
to your Honours Commands, *usq; ad Aras,*

JOHN GODOLPHIN.

To the Reader.

NOt in the least to Anticipate any *Just* Exceptions, but (if possible) to prevent all prejudice, let me premise, That the Industrious M^r Swinburn, (*Second* to none that ever Writ of this *Subject* in our Native Dialect) having been pleas'd to confine himself to the incomparable Lawes of his own Profession, hath left the fairer Latitude for *Variation*, admitting him to have transcend-ed all possibilities of *Imitation*. And if this *Treatise* speak not in its proper *Idiom*, it is because *Reports* could not so aptly as *Decisions* be taught the *Justinian* Language. Nor let it appear *Presumptive*, That a submiss *Votary* of his, seems to Invade the Territories of an *Alien* Profession, having so many *Presidents* for his *Warrant* therein, as (expunging but a very few Quotations of one or two Apocryphal Authors) may well amount to something like a *Justification* by vertue of the *Lex Talionis*; That with all submission to the *Judicious*, as with smiles to the *Captious*, the subscription at a venture may be

Thy Friend J. G.

Of Testaments and Last Wills.

The Chapters of the First Part.

- I. *What a Testament, a Last Will, and Codicil is, and how they differ.*
- II. *Of the several distinctions or kinds of Testaments.*
- III. *Of Testaments solemn and unsolemn.*
- IV. *Of Testaments Written and Nuncupative.*
- V. *Of Testaments privileged and unprivileged.*
- VI. *Of Codicils.*
- VII. *What persons are incapable of making Testaments or Last Wills.*
- VIII. *Of persons Intestable by reason of the want of discretion.*
- IX. *Of persons Intestable for want of Freedom or Liberty.*
- X. *Of Women Covert.*
- XI. *Of persons Intestable for want of their principal senses.*
- XII. *Of persons Intestable by reason of some Criminal Convictions.*
- XIII. *Of Conditional Testaments.*
- XIV. *Of the several kinds of Conditions incident to Testaments.*
- XV. *Of Testamentary Conditions in reference to Marriage.*
- XVI. *Of the manner of proceeding during the suspense of the Condition.*
- XVII. *Of Testaments void.*
- XVIII. *Of Testamentary Revocations.*
- XIX. *Of a Reviver of a Will revoked.*
- XX. *Of the Probate of Testaments.*
- XXI. *Of Proof requisite to a Will.*
- XXII. *Bona Notabilia.*



THE ORPHANS LEGACY.

The FIRST PART.

OF Testaments and Last Wills.

CHAP. I.

*What a Testament, a last Will, and Codicil is :
And how they differ.*

A Testament is a *Just Sentence* of our Will, touching what we would have done after our death, with the appointment of an Executor. (a) Exchange the words [*Just Sentence*] into the words [*Lawful Disposing*] and then it defines a *Last Will*. (b) And if instead of [*with &c.*] you say *without* the appointment of an Executor, you give the definition of a Codicil. (c) But an *Executor* and a *Last Will* or *Testament* are such Relatives as the one cannot be without the other. (d) Inasmuch, that although much be written in the name of a *Will*, many Legacies bequeathed, and many things appointed to be done; yet if no *Executor* be named, expressed or implied, it is no *Last Will* or *Testament*. (e) Thus a *Testament* is a *Just Sentence* of our Will touching what we would have done after our death. A *Last Will* is a *Lawful Disposing* touching what we would have done after our death. And a *Codicil* is a *Just Sentence* of our Will touching what we would have done after our death, without the appointing of an Executor.

(a) L. 1. §. de testa.

(b) Mant. de con. ult. vol. lib. 1. tit. 4. n. 13.

(c) Ibid. tit. 8.

(d) l. 10. ff. de jur. Cod. Plow. Com. 185. in Woodward & Darcey's Case.

(e) Inst. de hered. l. 1. l. 2. ff. de Vulg. Substit. l. hered. palam. ff. de Testam. & Broo. tit. Execut. 20.

See Inferences
from the definiti-
on of a Testament.

From the said Definition of a *Testament*, the Legal Inferences are six, viz. 1. That a Testator in his Will may not command or order any thing against Justice, Piety, Equity or Honesty. 2. That it be full and perfect without defect or imperfections, either in respect of Solemnity, or in respect of Will and meaning. 3. That it ought to be advisedly and deliberately made, and not *absq; animo Testandi*. 4. That the Testator ought to be *sui juris*, in respect of what he disposeth in his Will. 5. That his Will be independent, not suffering the least coercion or dependence on the will or pleasure of any other. 6. That the Testament receives life by the Testators death, and is of no force till his decease.

Such a Testament
as whereinto the ap-
pointment of an
Executor is essen-
tial, doth prop-
erly refer to Goods
and Chattels; for
Lands by virtue
of the Statute
may be devised by
a Will in writing,
where no Execu-
tor is named.

(f) Sheph. Epit.
cap. 155.

(g) D. D. post
glos. in dict. l. 1.
§. de testa.

(h) Mantie. ubi
sup. tit. 5.

(i) Aul. Gel.
lib. 6. c. 12. to
Serv. Sulp.

Sealing not abso-
lutely necessary to
a Will.

(k) Offic. ex.
cap. 2.

(l) Ibid.

A Testament is frequently called a *Will* or *Last Will*; for these words are commonly *Synonymous* and promiscuously used: yet some are of Opinion, that they understand it most properly, who limit a *Will* only to Land; and a *Testament* only to *Chattels* requiring Executors, which a Will only for Land doth not require: For it seems that by the Common Law where Lands or Tene-
~~ments are only devised by writing, albeit there be no Executor~~
named, yet that is properly called a *Last Will*; and where it concerns only *Chattels*, a *Testament*. (f) The truth is, a *Testament* taken strictly according to the said definition differeth from a *Last Will*, (g) yet not as opposite thereto, but only as the *Special* differeth from the *General*; for every *Testament* is a *Last Will*, but every *Last Will* is not a *Testament*. In a word, a *Last Will* is a general word, and agrees with each several kind of *Last Wills* or *Testaments*. (h) But a *Testament* properly so called, is only that kind of *Last Will* wherein an Executor is named or appointed.

Plowden in his Commentaries doth define a *Testament* to be the Witness of the mind, and to be compounded of these two words, viz. *Testatio* and *Mentis*: But this is no adequate definition of a Testament; neither is it a compound word, (i) but a single word, such as is *Calceamentum*, *Paludamentum*, and the like. And if it be demanded whether a Testament may be good in Law without a Seal, it is Answered in the Affirmative; for a Seal is not absolutely necessary to a Testament, though it may be fit and expedient. (k) For a *Will* not being properly and legally a *Deed*, may be good enough without a Seal, which is one essential part of a *Deed*; yet hath a *Will* the force and effect of a *Deed*. (l)

C H A P. II.

Of the several Distinctions or kinds of Testaments.

A Testament is either *Solemn* (a) or *Unsolemn*. (b) This though the first and greatest distinction of Testaments, yet of least force or use with us now in *England*. 2. Testaments are either *written* or *Nuncupative*. (c) 3. They are either *priviledged* or *unpriviledged*. (d) Of *Priviledged* Testaments there are three sorts, whereof some are called *Militarie* Testaments; others are called Testaments only among the Testators own *Children*; and others are Testaments to *Charitable* and *Pious* uses. But if no *Executor* be named or appointed, then it hath not the name of a Testament, yet it shall retain the name of a *Last Will*, and comprehends one of these three, *viz.* either a *Codicil*, or a *Legacy* and *Devise*, or a *Gift* in regard or by reason of death.

(a) L. hac consult. C. de Testa.
(b) l. 1. ff. de injust. rupt. & irrit. testa.
(c) Myns. Inst. de testa. ordin. 6. fin.
(d) Mant. ubi sup. l. 1. tit. 57.

C H A P. III.

Of Testaments Solemn and Unsolemn.

I N *Solemn* Testaments are comprehended the Solemnities of the *Civil Law*; as the presence of seven Witnesses, their subscription or subsignation; the making or expediting the act of the Will it self at one and the same time; with divers other Solemnities necessarily required by the *Civil Law* as Essential to a Testament, whereof we have no use here in *England*, being not obliged to such Ceremonies. (a)

In *Unsolemn* Testaments the said Ceremonies are omitted; and such are our Testaments here in *England*, wherein we are no further obliged than to the observance of such Requisites as are necessary *Jure Gentium*, which requires but two Witnesses: (b) And saving in a *Devise* of Land, wherein *Writing* is also necessary, and that it be made in the Testators life time. (c) The Testator (if he please) may make use of more than two witnesses, and procure their subscription, yea for prevention of Forgery to every page of the Testament, but no obligation hereto.

(a) Tract. de Rep. Angl. lib. 3. cap. 7. & Lynw. Const. in cap. Stat. verb. probatis, tit. de testa. lib. 3. & Bract. de Leg. & Consuet. Angl. l. 2. c. 25.
(b) Mant. ubi sup. lib. 6. tit. 3. nu. 9. in fine.
(c) St. H. 8. an. 32. cap. 1.

C H A P. IV.

Of Testaments Written and Nuncupative.

1. Testament Written, what?
2. Difference between Devise of Lands and Bequest of Goods.
3. Lands of Burgage tenure and by Custome deviseable, may pass Nuncupatively.
4. Naming Executor not necessary in a Will, only for devise of Lands.
5. Notes taken in writing sufficient for devise of Lands.
6. Testament Nuncupative, what?
7. The Will whether Nuncupative or Written, in case the Executors Name be omitted out of the writing?
8. Law Cases relating to this subject.

§. 1.

(a) Mynf. Inst.
de testa. ord. §.
Sed cum paulat.

(b) Mynf. Ibid.
§. fin.

(c) L. hac con-
sult. Cod. de Te-
sta. & glos. ibid.

(d) Auth. & non
observato. Cod.
de Testa. & DD.
ibid.

(e) Offic. Exec.
cap. 2.

(f) 6 H. 6. Dyer.
32.

(g) Offic. Exec.
ubi supra.

A *Written Testament* is such as at the time of making thereof is committed to writing. (a) By which words are excluded such Testaments as are afterwards put into writing. For being first made by word of mouth they still remain *Nuncupative*, notwithstanding the reducing thereof into writing after the Testators death. (b) Among other advantages that a Testator hath by a *written* Will this is one; that he may conceal the Contents thereof from the Witnesses, (c) which in a *Nuncupative* Will he cannot do. And it is sufficient, if taking his Will in his hand he say unto the Witnesses, This is my Last Will and Testament, or herein is contained my Last Will; or other words to the like effect. (d)

2. As touching the disposition of Land of Inheritance by Will, if it be not fully written before the Testators death, so far at least as concerns the disposition of the said Land, it may not be for that part made good by reducing it to writing after the Testators death, but as touching Goods and Chattels it may. (e) Nevertheless if it be written before the Testators death, though it be never brought nor read to him after the writing thereof, yet is it good enough, and that not only for Land, but also for Goods and Chattels, provided that there be an Executor named. (f) And this shall be a Will in writing and not verbal only, yea though it want the subscription of the Testators Name. (g) For many cannot write at all, and some want hands: Nor is the subscribing the name of the Maker any essential part of a Deed, much less of a Will, which needs not sealing as a Deed doth.

3. Lands and Tenements deviseable by Custome may pass by a *Nun-*

PART. I. Of Testaments and Last Wills.

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a *Nuncupative* Will for any time whatsoever; for in a Devise of Lands, Tenements and Hereditaments held in Burgage-tenure, it is not necessary that the same should be written, because such may pass sufficiently by Will Nuncupative, (b) because such Lands were deviseable before the making of the Statute of H. 8. enabling to devise Lands, Tenements and Hereditaments by Will in writing in the Testators life-time, which cannot pass by a *Nuncupative* Testament or Will without writing: (i) So that Lands of Burgage-tenure, and by Custome deviseable may pass Nuncupatively, though Lands of other tenures are not deviseable but by Will in writing.

(b) Swinh. part. 1. §. 11. n. 5.

(i) Stat. H. 8. an. 32. c. 1.

4. Though the naming or appointing of an Executor be essential to constitute a Testament or Last Will, yet this properly refers only as to Goods and Chattels; for a man may by his Last Will in writing devise his Lands, Tenements and Hereditaments, though he make no Executors, because an Executor hath nothing to do with the freehold of Land.

5. If the Writer doth only take Notes from the mouth of the Testator of his Last Will, for the devise of Lands, Tenements and Hereditaments, and afterwards write the same; but the Testator dies before it be shewed unto him; yet this is sufficient for a Will in writing for the conveying of Lands, Tenements and Hereditaments. (k) Likewise it is sufficient if Notes or Articles be made and read to the Testator, though the same be not ingrossed at large or in form of Law until after the Testators death. (l)

(k) Dyer in Casu inter Sackville & Browne.

(l) Ibid. sup. ult. vol. ejusdem Hanton.

6. Testaments are called *Nuncupative*, when the Testator without any writing doth declare his Will before a sufficient number of Witnesses; (m) and such *Nuncupative* Will is of as great force and efficacy (except for Lands, Tenements and Hereditaments) as any written Testament. (n) Yea this verbal, oral, or *Nuncupative* Will, being after the Testators death reduced to writing, and having the Court Seal affixed thereunto, is of as good validity touching the disposal of Goods and Chattels, as if it had been written in the Testators life-time. (o)

(m) Inst. de test. ordinan. §. fin. de l. heredes. ff. de testa.

(n) l. hac Confaltat. §. per nuncupat. C. de testa.

7. Although many Legacies be made and written in a Will, and many things expressed to be done, yet if no Executor be named in the writing, only A. and B. by word of mouth appointed to be Executors; this shall not amount to a Will in writing, but to a *Nuncupative* will only, (p) because one essential part of the Will, (viz. the appointing of an Executor) is omitted out of the writing. Nay, the appointing of him Executor, who is named in such a Note left with C. D. is no sufficient making of an Executor at all. (q) Nor is the appointing of any one by a doubtful and uncertain Name a sufficient making either of an Executor or Legatary, (r) unless some other sufficient circumstance

(o) Stat. 14 H. 8. c. 5. & 5 H. 8. c. 1. M. 15. & 6 Eliz.

(p) Offic. Exec. ubi sup.

(q) Sum. Silv. tit. de testa. fol. 443. 6.

(r) Inst. de Legatis. §. incertis.

doth

doth make it plainly appear whom the Testator meant; so tender and cautious is the Law of fixing the interest of any upon meer doubts and uncertainties.

8. A man took Notes of a Will of one who lay sick, and afterwards he drew up the Will in writing, but the sick person dyed before it was shewed to him. Yet it was the opinion of the whole Court, that the same was a good Will, within the Statute of 32 H. 8. to convey Socage Land. *Trin. 6 E. 6. Dyer, 72.* So was it adjudged in 4 and 5 Eliz. in *Hintox's Case*, where Articles were read to the Devisor concerning the disposition of his Lands, and the Articles were written and engrossed after his death; and yet it was a good Will within the said Statute of 32 H. 8.

Hugh. Abridg.
verb. Wills and
Testaments.

A man intended Land to *J. S.* for life, the remainder to *J. D.* and before the remainder was written the Devisor dyed. It was the opinion of the Court, that the same was a void Devise for the whole Lands within the Statute of 32 H. 8. because that the one did depend upon the other: But in that case it was holden, that if a man seised of two Acres, intends one of them to *J. S.* and the other to *J. D.* and the Devise to one is written, but the Devisor dyeth before the Devise of the other Acre to the other is written; It is a good Devise for the Acre which is written, but not for the other Acre.

*Trin. 11 Jac. in
C. B. Cesar and
Lakes Case.
Adjudged see.
Hugh. Abridg.
Ibid.*

B. Brought Writ of Entry in nature of an Assize against his Father's Wife. The Case upon Evidence was this, viz. *H. B.* the Plaintiff's Father, and Husband of the said Wife, being sick at London sends for *A.* desiring him to write the Last Will and Testament of his Lands. *A.* desires *B.* to declare what he would have his Last Will and Testament to be, and who to be his Executors, whereupon *A.* wrote short Notes of his Last Will, and every Legacy, and who should be his Executors, then return'd to his own House, there wrote the said Will in Order and Form, and therewith returning to the House of *H. B.* within half an hour after 12, intending to have read the same unto him, was then told that the said *H. B.* dyed at twelve of the clock just before. Whereupon *A.* delivered the same to the Executors that were therein named. The Wife enters on the Testators Tenements, and what was Devised to her, the Son enters upon her, the Wife re-enters, whereupon the Plaintiff brought his Writ. The Opinion of all the Justices was, That it was a good Will in writing, according to the Stat. of 32 H. 8. and declared their Opinion on the Evidence given; whereupon it passed for the Wife, and she enjoy'd the Land.

*Brown and
Brown's Case.
Mich. 4 & 5 P. &
M. Anderl. Rep.
Caf. 85.*

CHAP. V.

Of Testaments Priviledged and Unpriviledged.

1. Testaments Priviledged what, and how many kinds thereof.
2. Military Testaments, their priviledges.
3. Testaments made in favour of the Testators Children, their priviledges.
4. Testaments made for good and pious uses, their priviledges.
5. Testaments Unpriviledged, what?

§. I.

Testaments Priviledged are such as are qualified by some special freedome or benefit contrary to the common course of Law, (a) or by some special freedome are discharged from the usual Requisites and Observations of Common and General Law; whereof there are (as in the second Chapter) chiefly these three kinds, viz. 1. Military Testaments. 2. Testaments made in favour of the Testators Children. 3. Testaments for good and pious uses.

2. The priviledges of Military Testaments, or of a Testament made by a Souldier are many, but chiefly these Four; viz. 1. A Souldier is not disabled from making his Testament by any of those impediments which disable others, unless for want of Reason, or other like grand causes whereby he is disabled *Jure Gentium*. (b) 2. Whereas divers persons are prohibited from being Executors or Legataries to other persons, yet the Law doth not so prohibit them from being Executors or Legataries to a Souldier, save in some very few Cases specially limited in the Law. (c) 3. Souldiers are clearly acquitted from the observation of the Solemnities of the Civil Law in making of Testaments. (d) 4. Whereas no other person can dye with two valid Testaments, yet a Souldier may, and both Testaments shall stand good according to the intent or meaning of the Testator. (e) Other priviledges there are peculiar to Souldiers in making their Testaments, but they being many, (f) it would not answer the design of a Compendium to make a specification thereof. Only let it not here escape our Observation, that these Priviledges belong only to such Souldiers as are in expedition or actual Service of war, (g) and not to such as lye safely and securely in some Castle, Garrison, or other like place of defence. (h)

3. The priviledges of Testaments made in favour of the Te-

stators q

(a) Mant. ubi sup. lib. 1. tit. 57. in fin.

(b) Myns. de Milit. Test. in pr. (c) Bart. in dict. tit.

(d) l. Divus. ff. de mil. test. §. plane. Inst. de test. (e) L. querebatur. ff. eod.

(f) Vals. de success. resol. lib. 2. §. 20. ubi enumerat 70 Privilegia militibus indulta.

(g) l. pen. C. de test. mil. & Mant. ubi sup. l. 6. tit. 1. nu. 32. §. sed hacenus. Inst. de mil. test. & Gail. Obs. 128.

(h) Myns. §. Illis autem. Inst. de mil. test. & Jul. clar. §. testam.

q 15. in fin.

stators Children, are chiefly these three, viz. 1. If two Testaments be found after the Testators death of divers tenures, and it appear not which of them is the latter Testament; In this Case that shall be presumed the latter, and so prevail, which is made in favour of the Testators Children. (i) 2. The Testament made in favour of the Testators Children, is not so easily revoked as possibly other Testaments may be. (k) 3. A Fathers Testament among his Children shall take effect, though there be no Witnesses to prove the same, being written or subscribed by the Testators hand, or by him procured to be written by some other. (l) Howbeit these two last Priviledges by the Custome of *England*, the latter of them especially, are common to all English mens Testaments; so also are all other priviledges which the Law doth indulge to such Testaments *inter Liberos*.

4. The Priviledges of Testaments made for good and pious uses (being such as are made to Orphans, Widows, Strangers, Prisoners, Lame and Diseased persons being poor and indigent, to Hospitals, Schooles, Colledges, also for the redemption of Captives, repairing of City-Walls, Bridges, and such like) are chiefly these four; viz. 1. This kind of Testaments may be written with strange and unaccustomed Characters, yet shall be good and effectual. (m) 2. If the Testament *ad pios usus* be found Cancelled, and it be not known whether the Testator did willingly cancel the same, the Law presumes it to be unadvisedly cancelled, whereas in other Testaments the contrary is presumed; but in this kind of Testaments *ad pios usus*, if it be not certainly known that the Testator did wittingly cancel the same, it shall be in effect as if it had not been cancelled at all. (n) 3. In this kind of Testaments it is sufficient that the condition (if any be) be observed and accomplished by other means than according to the precise form of the condition. (o) Whereas in other Testaments or Legacies, it is not sufficient unless the condition be precisely observed. (p) 4. The Testament *ad pios usus* is not void in respect of uncertainty, as other Testaments are. (q) And generally most Priviledges that do belong to other priviledged Testaments, do belong also unto this Testament *ad pios usus*.

5. Testaments *Unpriviledged* are such as have not any benefit or freedom above, or contrary to the common course of ordinary Law, but are generally obliged to the observation of such Requisites as the Law regularly appoints for all Testaments.

(i) Bart. in l. 1. §. 1. de bon. poss. secund. Tab. ff. Clar. §. testa. q. 300.
(k) Auth. hoc int. Liberos, cod. de Testa. & Glos. ibid.
(l) Bald. Paul. de Castro. & Jaf. in Auth. Quod sine C. de Testa.

(m) Mant. ubi sup. l. 6. tit. 3. n. 3. & Tyraq. de Privil. piz. Caus. c. 12.

(n) Covar. in Rub. de test. part. 3. nu. 19. & Mant. ubi sup. l. 12. tit. 2. n. 32.
(o) Tyraq. ubi sup.
(p) l. Mævius. & l. qui hered. ff. de Cond. & dem.
(q) Bart. & Jason. in l. 1. C. de Sacros. Eccl. & Graß. Theol. Com. Opin. §. Instit. q. 22.

CHAP. VI.

Of Codicils.

1. *The etymon, and original of the word.*
2. *The definition of a Codicil.*
3. *Codicil may be made with or without writing, before or after the Testament.*
4. *Who may make a Codicil; and whether more Codicils than one may consist together?*

1. **A** Codicil in the Etymologie thereof, doth signifie a little Book, *Codicillus* being but the diminutive of *Codex*: you may if you please call a Testament a great Book, and a Codicil a little Book or writing. The Original of these Codicils was merely occasional; for when by reason of the multiplicity of legal Solemnities requisite to a Testament, which are not so to a Codicil, the Testator failing of sufficient opportunity to make a Testament Solemn, was enforced to fly to the refuge of a Codicil for declaration of his Will to be performed *post mortem*: Or otherwise as additional to the Testament, touching something therein omitted; or explanatory to it, touching something therein ambiguous; or derogatory to it, touching something therefrom to be detracted.

2. Every man that writes of this Subject abounds in his own sense touching the definition of a Codicil; but he will be found least in error who defines a Codicil to be the just Sentence of our Will, touching that which we would have done after our death, without the appointing of an Executor. (a) Yet here observe, that the word [*just*] is not so comprehensive in this case as in the definition of a Testament; for here it doth not signifie those Solemnities and ritual Formalities which are Testamentary, but only an exclusion of illegalities, and inclusion of such perfections as are consistent with the nature of a Codicil; so that we may not improperly infer, That a Codicil is a kind of an unsolemn Last Will. (b)

3. A Codicil may in effect be made either in writing or without it, (c) provided you do not call it a Nuncupative Codicil, that being an abuse of words; for if a Codicil may, as aforesaid, be called a Little Book or Writing, it is improper to call it Nuncupative; therefore although all the power and force of a Codicil may be made without writing, yet being so made it may not otherwise than improperly and *abusive* be termed a Codicil, but rather something *Loco Codicilli*, and which hath the full force and effect of a Codicil. Also a Codicil may be made as well by him

C

who

(a) Mantie. l. 1. tit. 8.

(b) Graf. Thef. Com. Op. §. Codicil. in prin.

(c) Gloss. in Rub. c. de Codicil. & Minus. in dict. Rub. Instit. & Wesemb. in ff. de jure Codicill.

(d) l. conficiuntur in prin. ff. de iure Cod. & §. non aut. n. Inst. de Codicil.

(e) l. confic. ibid. (f) Vigel. meth. Jur. Civil. part. 4. l. 9. c. 23.

(g) Myning. post gloss. in §. non tantum. Inst. de Codicil.

(h) Bart. & alii in l. 2. de Legib. 2. & Graf. Thef. Com. Op. §. Cod. nu. 2.

(i) l. cum proponat. Cod. de Codicil.

(k) Gloss. & DD. in dict. l. cum proponat. & Graf. Thef. Com. Op. §. Codic.

who dieth Intestate as by him who dieth Testate. (d) Neither is it material whether it be made before or after the Testament; (e) for in both cases it shall be reputed as part and parcel of the Testament, (f) and to have equal force with it; unless being made before the Testament it be revoked in the Testament, or be contrary to what is contained therein. (g)

4. Persons capable or incapable of making Testaments are even such also as to Codicils (h) Yet a man may die with divers Codicils, and the latter shall not (as in divers Testaments) null the former, so as the one be not contrary to the other. (i) And if in such Codicils (it not appearing which was first or last) one and the same thing be given to one person in the one, and to another person in the other, the Codicils are not void, but the persons therein named ought to divide the thing equally betwixt them. (k)

CHAP. VII.

What Persons are incapable of making Testaments or Last Wills.

(a) Instit. quib. non est perm. fac. test. in prin. & gloss. ibid. (b) Roland. de Codic. n. 6. (c) Gloss. Inst. ubi sup. §. 1. & Graf. Thef. Com. Op. q. 26. nu. 1.

Regularly every person hath full Power and Liberty to make a Testament or Last Will, (a) and therein may dispose of his Goods and Chattels; (b) except such persons as are prohibited by Law or Custome, (c) whereof some are prohibited because they want *Discretion*; such are Children, Mad Folks, Idcots, Old Persons grown Childish, and such as are drunk: Others, because they want *Freedom* and *Liberty*; such are Villains, Captives, and Women Covert: Others, because they want some of their principal *Senses*; such are the Deaf, and Dumb, and Blind: Others, because they are *Criminall*; such are Traytors, Felons, wilfull Self-murderers, and the like. Others, because of certain *Legal impediments*; such are Out-lawed Persons, men at the point of Death, Alien Enemies, and such others. But here Note that all the said persons are not in all cases absolutely and utterly intestable; for that some of them are intestable, but in some Cases only, as will more distinctly appear hereafter. Note also, that the King, his Heirs and Successors may lawfully make their Testaments, and that Execution shall be done of the same. (d) The Lord Cook makes mention of the Testament of King H. 4. and his Executors refusing, the Arch-Bishop of *Canterbury* was to grant Administration with the Testament annexed. (e).

(d) Cook. Inst. part. 4. cap. 24. Cur. Prerog. ubi Citat. Rot. Par. 26. R. 2. nu. 10. & Rot. Par. 3 H. 5. n. 13. (e) Cook. ibid. 26. 1 H. 6. n. 18.

PART I Of Testaments and Last Wills.

II

CHAP. VIII.

Of persons Intestable by reason of the want of Discretion.

1. Of Children in Minority.
2. Of Mad Persons; and proof of Insanity.
3. Of Idiots or Natural Fools.
4. Of Persons grown Childish by reason of Old Age.
5. Of such as are Drunk.
6. Law-Cases relating to the third Paragraph of this Chapter.

1. **A**N Infant-Male at the Age of fourteen years, and Female at the Age of twelve years, may make a Testament touching Goods and Chattels; (a) although both Sexes in construction of Law are Minors or Infants untill the Age of twenty one years, (b) till which Age neither of them can make any Conveyance of Land good in Law. (c) And before the said respective Ages of twelve and fourteen years neither of them can make any Testament at all, no, though it be *ad pios usus*: (d) But at the accomplishment of the said respective Ages each of them may, even without the consent of his or her Guardian (e) or Parent, if they have any Goods in their own right, make a Testament thereof, (f) though not of Lands of Inheritance, (g) unless the Custome of the place doth enable them for it. (h) But before the said respective Ages neither of their Testaments is good, though made by the approbation and with the consent of their Guardians; (i) yea, though they afterwards attain to the said Ages, and then neglect to ratifie them: (k) But if he or she hath attained to the last day of the said Ages of twelve or fourteen years, the Testament so made by him in the very last day of the Age of fourteen years, or by her in the very last day of the Age of twelve years is as good and lawful, as if the said day were then already expired; (l) or if after the accomplishment of the said Ages respectively, he or she doth expressly approve and ratifie the Testament made during their minority, then is the same made good and effectual by this new declaration thereof. (m)

2. Such as are Mad persons can make no Testament during the time of their insanity of mind, (n) no, not so much as *ad pios usus*. (o) Nay, the Testament made at such a time shall not be good, though afterward the party recover his former understanding; (p) howbeit if such Lunatick persons have any *Lucida intervalla*, or intermissions, then during the time of such freedom from the Lunacy they may make their Testaments betwixt the fits. (q) And here Note, that every person is presumed to be of

(a) l. qua etate. ff. qui Testa. fac. possint. & ff. preterita. & Inst. quib. non est permisi. & l. si frater. C. qui testa. fac. poss. & Cowell. Inst. lib. 2. tit. 12.
(b) Dr. & Strud. l. 1. c. 22. & lib. 12. c. 22.
(c) Stat. 14 H. 8. c. 5.
(d) Jaf. in dict. l. si frater.
(e) Jaf. ibid.
(f) Perk. tit. de viis. fol. 97.
(g) Stat. 34 H. 8. c. 5.
(h) Perk. ib. fol. 504.
(i) Jafubi supra.
(k) l. preterita. Inst. quib. non est permisi. fa. test.

(l) dict. l. qua etate. & ibi Bart.

(m) Paul. de Cast. & alii in l. si frater. C. qui testa. fac. poss.

(n) l. furiosum. C. qui testa. fac. poss.

(o) Bart. in l. 1. c. de Sacros. Eccl. m. 16.

(p) dict. l. furiosum.

(q) Ibid. & dict. ff. preterita. & D.D. ibid.

(r) Bart. in l. nec
Codicillos Cod.
de Codicillis.
(s) Bart. ibid.

(t) Glof. in c. fin.
de Succel. ab In-
teftat.

(u) Mantie. ubi
fupra. lib. 2. tit. 5.

(v) Bald. in diſt.
l. furioſum. &
Maſchard. de
probat. ver. fu-
rioſus.

(x) Maſch. ibid.
& Conf. 127. n. 9.
(y) Ibid.

(z) Maſch. poſt
Ruin. ubi fupra.

(a) Gabriel. l. 1.
Com. Conf. tit.
de Teſt. Con. 4.
nu. 19.

(b) Graſ. Theſ.
Com. Opin. verb.
Teſta. q. 21. &
Vaſq. de Succel.
l. 1. §. 2. nu. 20.
(c) Graſ. 25. n. 4.
& Boer. q. 23. n.
88. & Ludo. De-
ciſ. 1. nu. 13.

(d) Bald. & An-
gel. in diſt. l.
furioſum.

(e) Angel. ibid.

(f) St. H. 8. an.
24. c. 5.

(g) Si. hand. in
Rub. C. qui teſt.
ſac. poſt. nu. 26.

(h) Sino. de
Pret. de interp.
ult. vol. l. 7. dub.
3. l. 4.

perfect mind and memory until the contrary be proved. (r) So that he that objecteth Insanity of mind must prove the same; (s) for which it is sufficient if he prove, that the Testator was beside himself, or had lost his Reason but just before he made his Testament, though he prove not the Testators madness at the very time of making the same, (t) unless the contrary be proved, or circumstances to induce a contrary presumption. (u) For it is a very tender and difficult point to prove a man not to have the use of his Reason and Understanding; therefore it is not sufficient for the Witnesses to depose that the person was mad, unless withall they render upon knowledge a sufficient reason thereof. (v) Neither is one Witness sufficient to prove a man mad, (x) nor two, in case the one depose of the Testators madness at one time, and the other of his madness at another time; (y) but both agreeing in time, if then the one Witness deposeth of one mad act, the other of another mad act at one and the same time, these sufficiently prove that the Testator was then mad, though they do not both depose of one and the same mad act. (z) But in contrary depositions these Witnesses are to be preferred, which depose that the Testator was sound of memory. (a) And if he used to have some intervals of Reason, and it be not certainly known whether the Testament were made in or out of his fits of Lunacy; in this case, if no argument of frenzie or folly can be collected by the Testament, it shall be presumed to be made during the intermissions of the Lunacy, and so adjudged to be good; (b) yea, though it cannot be proved that the Testator used to have any clear and calm intermissions at all, provided the same Testament be wisely and orderly made, (c) otherwise not. (d) For in this case, the least word sounding to folly is sufficient to induce a presumption that the Lunatick person had no intermission of perfect Reason and sound Memory at the making of such Testament; for one foolish word in that case may frustrate the validity of the whole. (e) But if a man who is of good and perfect Memory, maketh his Will, and afterwards by the visitation of God, he becomes of unsound Memory (as every man for the most part before his death is) this Act of God shall not be a Revocation of his Will, which he made when he was of good and perfect memory. Cook, 4. part 124. *Beverlyes Case*.

3. *Ideots* are likewise excluded from making Testaments, nor may they dispose either of their Lands, (f) or of their Goods; (g) But he that only is of a mean capacity or understanding, or one who is as it were betwixt a man of ordinary capacity and a fool, such an one is not prohibited from making a Testament, (h) provided that he hath understanding enough to conceive what is the nature of a Testament or Last Will, being well informed thereof.

thereof; otherwise he being destitute of such understanding is not fit to make a Will. (i) Here Note, that by the Laws of this Land, he that can measure a yard of cloth, or rightly name the dayes of the week, or beget a Child, shall not be accounted an Ideot or a Natural Fool; (k) yet it will not be indisputably granted, that an Act so Natural as the begetting of a Child can so qualifie a Natural Fool as to render him in the charitablest construction of Law Testable. For if he be such a Natural Fool, as that though of Lawfull Age, yet cannot declare of about what Age he is, nor number twenty, nor knoweth his Natural Parents by their several names and Relations, or the like easie questions, such an Ideot is undoubtedly intestable. (l) Notwithstanding all which, if it may appear by sufficient circumstances and conjectures, that such Ideots had the use of Reason and Understanding at such time as they did make their Testaments, then are such Testaments, good in Law. (m)

4. *Persons grown Childish by reason of old Age* can no more make their Testaments then Children; (n) yet old Age alone doth never deprive a man of the power of making his Testament: (o) But when a man, by reason of extream old Age, is become even a Child again in his Understanding, or rather in the want thereof, or by reason of extreme old Age, or other infirmity is become so forgetful, that he now knoweth not his own Name, he is then no more fit to make a Testament then is a Natural Fool, or Child, or Lunatick person. (p)

5. Such as are *Drunk*, during the time of their being *Drunk* can make no Testament that shall be good in Law: (q) yet understand this, as only when he is so excessively drunk, that he is altogether deprived for the time of the use of Reason and Understanding, being, according to the Flaggon-phrase, as it were dead-drunk; for if he be but so drunk, that his Understanding is but somewhat clouded and obscured, and his Memory but troubled, he may in that case make his Testament, and it may be good in Law. (r)

6. *A. Executor of J. S. brought an Account against B. as Receiver of the monies of the said J. S. upon Ne unq; Receiver pleaded: It was found for the Plaintiff, and Judgment given, that he should Account; and being in Custody upon a Capias ad Computandum; he was found in Arrearages, and his body taken in Execution. Afterwards the Will was made void in the Ecclesiastical Court, for that the said J. S. was an Ideot from his birth; which being certified by Writ into the Chancery, and thence by Mittimus into B. R. an Audita Querela was brought by B. setting forth all the said matter, whereupon the Court demurr'd. (20) It was said by Cook, That in 35 H. 8. It had been Adjudged, That in that Case the Audita Querela did well Lie.*

(i) Cook lib. 6. in Casu Paulet. le Marq. de Winchester.

(k) Term of Law verb. Ideot. & Stamford. de Prerogat. Regia.

(l) 3 Eliz. Dy. 203, 204.

(m) Franc. in dist. L. Furiosum. & Mant. lib. 2. cap. 15.

(n) Sino. de Pretis. de interpretat. ult. vol. lib. 2. Dub. 1. Sol. 4. nu. 22.

(o) l. Senium. C. qui testa. fac. poss.

(p) l. fin. C. de hered. instit.

(q) Vassq. de Success. crea. l. 2. §. 13. Requirit 7. nu. 9. & S. mo. de Pretis. ubi supra. l. 2. Dub. 1. Sol. 4. nu. 22.

(r) Idem Vassq. & Sino. de Pretis. ubi supra.

(20) 3 Eliz. Dyer. 203. vid. Cook. 8. part. 147. in Dr. Druric's Case. In Hanks. A. bridgmont. verb. Wills and Testaments.

The

The Marquess of *Winchester*, by his Will in writing (as supposed) Devised divers Mannors to his Reputed Sons, Devising further, that they should sell divers Mannors, and also bequeathed Plate, and other Legacies to them. This Will was assayed to be Proved in the Prerogative Court; but it appearing by circumstances, the said Marquess to be *Non compos mentis* at the time when the supposed Will was made, it was moved for a Prohibition in *B. R.* because a Will touching Lands, and a Will concerning Goods were both mixt together; and that in Case they should there proceed as to the Goods, the same would prevent the Tryal in the Kings Bench, where a Will for Land shall be Tried; for which Reason a Prohibition in that Case was generally awarded. 2. In that Case it was resolved, That a Testator at the making of his Will ought to be of a memory, not only to answer to ordinary and familiar questions, but also to have a disposing memory, so as to be able to make a disposition of his Lands with Reason and Understanding; and that That is such a memory, which the Law calls *Sane Memoria*.

(14) Trin. 31.
Eliz. in *B. R.*
Cook. 6. part. 23.
The Marquess of
Winchester's Case
in *Hughes Abridg-*
ment. *ibid.*

C H A P. IX.

Of Persons Intestable for want of Freedom or Liberty.

1. Of Villaines.
2. Of Captives.
3. Of Prisoners.

1. **V**illaines are Intestable, if their Lord by Entry and Seizing take and enjoy all their Lands and Goods, (a) otherwise their Wills are not void, but by such Entry and Seizing before Probate they become voidable; (b) Except of such Goods, whereof such Villains were Executors to others; for of such Goods they may not only make their Wills, (c) but also maintain actions even against their Lords, in case they should take from them such goods as they have by Executorthip. (d) But of this there is little or no use with us now here in *England*, as in former times.

2. A *Captive*, during the time of his Captivity, cannot make a Testament, (e) yea, though he afterwards make an escape, yet the Testament made during the Captivity is void; (f) but if it were made before his Captivity, then after his escape or enlargement it shall be as good in Law as if he had not been Captive at all. (g) Likewise he that is alive and in Captivity (for the upholding of his Will which he made in his Liberty) is seigned by a Legal fiction to

(a) Broo. A.
bridg. tit. Villen.
& Perk. tit.
Grants. fol. 6.
(b) Dr. & Stu.
1. 2. c. 42.
(c) Broo. *ibid.*
nu. 75.

(d) *Ibid.* n. 68.

(e) l. eius qui ff.
de Testa. & Brac.
lib. 2. §. 16. n. 5.
(f) Dict. L.
eius qui.
(g) l. ratio ff. de
Canti. & Graff.
Thef. Com. Opin.
§. testa. q. 25.

be

be dead the hour before he became Captive; so that if he dye in Captivity, yet is his Testament so made before his Captivity allowed, and his Executor shall have all his Goods as if he had died the day before his Captivity. (b) Likewise if any person be taken by a Pirate, Turk, Infidel, or Christian, with whom open War is not proclaimed, he so taken remaineth a Freeman in construction of Law as to Testability notwithstanding such Capture, and therefore his Testament made during such restraint shall be good. (i)

3. Persons condemn'd to perpetual Imprisonment cannot make a Testament; (k) But a person imprisoned only for debt, or the like, is not thereby disabled to make his Testament, (l) or is his Testament void, except it be made in the favour of him at whose Suit the Testator is imprisoned, on purpose to extort the same from him. (m)

(b) l. lege Cornel. ff. de Testa.

(i) l. qui a Latronib. ff. de Testa.

(k) Panor. in Rub. Extra. de Testa. & Graf. Thef. Com. Opin. 6. Testa. c. 28.

(l) Bald. in l. r. Cod. Si quis aliquem test. prohibuit. 5.

(m) l. qui carcerem. ff. quod metus causa. & Mant. sup. l. i. tit. 7. m. 2.

CHAP. X.

Of Women Covert.

1. *Women Covert Intestable as to Lands.*
2. *They are Intestable as to Goods without the Husbands Licence.*
3. *They are Testable as to Chattels by Executrixship.*
4. *They are Testable as to things meerly in action, whereof they were not possessed during Coverture.*
5. *Whether they may accept Executrixship without their Husbands consent, or the Husband Administer in case of their refusal thereof.*
6. *Cases in the Law concerning this Subject.*

1. **T**HAT *Women Covert* are Intestable for want of Freedom is not such a general Rule in Law as to exclude all exceptions. It is true, a married woman cannot make her Testament of any Lands, Tenements, or Hereditaments, (a) specially she cannot devise the same to her Husband, (b) though she were not thereto constrain'd by him, but would do it of her own accord freely and voluntarily, and though such Testament were made before her Marriage with such Legatary-husband. (c) And albeit the Wife survive the Husband, yet the Testament made during Coverture is not good. (d) But yet if after her Husbands death she approve and confirm such Testament, made under Coverture, then this new Consent or new Declaration of her Will makes the Devise good. (e) Also, if the Testament were made before Marriage,

(a) Stat. 34 H. 8.

c. 5.
(b) 2 Cook. Abridg. tit. Devise. m. 32, 34.

(c) Arg. 6. a No. Inst. quib. mod. testa. infir.

(d) c. non firmat. de Reg. jur. c. l. 1. §. 1. de Legat. 2.

(e) l. 1. §. 1. ff. de Legib.

riage,

(f) Plowd. in
Cas. inter Brett
& Rigden. f. 343.
(g) Stat. 16. H. 7.
c. 20.

riage, and she out-live her Husband, it shall be good. (f) Also, where power of selling the Testators Land is given to a Wife-Executrix, there she may sell even to her own Husband, (g) or to whom she please.

(h) Bract. de leg.
& Cons. Angl. l. 1.
c. 26. & Broo. tit.
De. use. nu. 34.
(i) Tract. de
Rep. Angl. l. 3.
c. 6. & Dr. &
Stud. l. 1. c. 7.
(A) Dr. & Stud.
ibid.
(I) Lynwood. c.
Sed. titum. verb.
de Testa. l. 3. &
Bract. l. 2. c. 26. &
Broo. tit. De. use.
nu. 34.
(m) Perk. tit.
De. use. cap. 8. fol.
97.
(n) Ibid.
(o) Brook. ubi
supra.

2. Of Goods and Chattels the Wife cannot make her Testament without her Husbands License; (b) for all the Goods and Chattels which the Wife had at the time of marriage, (i) and all the Chattels real (if he survive the Wife) belong unto the Husband by virtue of the said marriage. (k) Yet by the Husbands License she may make her Testament even of his Goods, (l) yea, though the Husband understand not of his Wifes Will, yet if after Probate thereof made by the Executors he deliver them the Goods therein Devised, he thereby ratifies the Testament, though he were not privy to the making thereof; (m) for the Goods being once delivered by him according to the tenour of the Will, it is then too late for him to revoke the same; (n) Otherwise notwithstanding his License given her to make a Will of his Goods, he may revoke the same at any time before the Probate thereof. (o) Or otherwise having made her Will by her Husbands License, he may chuse whether he will suffer it to be Proved; for his Consent is necessary as well to the Approbation as to the first making thereof. And this extends also to the Goods which she had in her own right before marriage, for thereby immediately all Chattels personal, and Goods moveable are so devested out of her into her Husband, that although she survive him, yet they return not to her again, but go to her Husbands Executor or Administrator.

(p) Fitzh. Abridg.
tit. Exec. nu. 20.
& Brook. eod. tit.
nu. 11. & Perkins.
tit. De. use. c. 8.
fo 97. & Stat. 12.
H. 7. cap. 24.
(q) Offic. of Exec.
cap. 7. & Cos.
Apol. par. 1. c. 3.
(r) Offic. Exec.
ubi supra.
(s) Plowd. int.
Grimsby & Gran-
tham. fo. 523.

3. Touching Goods which she hath as Executrix to another the Case is otherwise, for such do (whether she or her Husband live or die) still remain in and to her only, whereof she may make her Will without her Husbands consent, (p) and him (if she please) Executor, for otherwise he may not have them after his Wifes decease, (q) because of such goods (the Wife dying without will) the next of Kin to the Wifes Testator may take the Administration, as *de bonis non Administratis*. (r) And here Note, that though the Wife being Executrix to another, may without her Husbands License make her Testament of such Testators Goods, yet she may not bequeath them by Legacy without making an Executor. (s) But if the Wife be made as well Legatary as Executrix, and she accept of the Testators Goods, not as Executrix but as Legatary, in this case she cannot dispose of the said Goods by Will or otherwise without the Husbands consent; for by accepting them as Legatary she makes them her own, and consequently her Husbands. (t) And Note further, that although the Wife being Executrix, may, without her Husbands License make

(t) Tract. de
Rep. Angl. l. 3.
c. 6.

make her Testament of such Goods whereof she is possessed as Executrix, yet the fruit and profit arising (during the Marriage) out of such Goods shall accrew to her Husband, and not unto her self as Executrix; so that without her Husbands approbation she can make no Testament of such fruits and profits so arising. (x) And if it doth not appear whether the Wife accepted the same as Executrix or as Legatary, she shall by the Laws of this Land, (herein not agreeable to the Civil Law) be deemed and presumed to have accepted the same as Executrix. (w) 2. The ground or reason of such presumption.

4. A Wife without her Husbands Licence or Consent may make her Testament of such Goods and Chattels whereof she was not possessed during marriage, and as to such things she may make her Husband Executor if she please. (x) And the Husband cannot by Will bequeath or make an Executor of an Obligation which he hath in right of his Wife, nor of any other thing merely in Action. (y) For debts or things in Action are not devided out of the Woman into the Husband by marriage, yet she cannot make an Executor thereof without her Husbands assent; (z) for during her life he may receive them or release them, though after her death he shall not be entitled to them, unless his Wife make him Executor thereof, or after her death he take the Administration of her Goods, whereby he then becomes lyable for her debts out of the same when he shall have received them. (a) And thus also Chattels real are not so devided out of the Woman into the Husband by marriage, but that she surviving him, and no alteration made of the property in her life-time by her Husband (who had then power to dispose thereof though not by Will) they continue to her and remain in her as before marriage; (b) yet such a Woman in her Husbands life-time could not without his consent make her Will touching such Real Chattels, but he surviving her they would by the operation of Law accrew unto him. (c)

5. As without the Husbands consent the Wife may not make her Will, so likewise without his consent she may not take upon her the Office of an Executrix: (d) But if once the Will be proved, and the Execution thereof committed to the Wife, though against the Husbands mind and consent, probably it may stand good. Also the Wives Administring without the Husbands privity, though no Will be proved, will probably barr the Husband as well as her self from pleading in any Suit commenced against them, That the neither was Executrix, nor ever Administred as Executrix. On the other side, if a married Woman named Executrix refuse the Execution of the Will against her Husbands mind and desire, it is supposed the Law will not fix the Executrixship

(w) Swinb. part. 2. §. 9. nu. 21. & part. 3. §. 6. n. 17.

(w) Plowd. in Cas. Inter Par. mor & Yardly & Dyer, fol. 277. An. Eliz. 12.

(x) Broo. Abr. tit. Test. n. 11. & Fitzh. Abr. tit. Execut. n. 109. (y) Le Abr. des Cases. edit. 1599. incerto Authore. q. 1. & 7 H. 6. fol. 2.

(z) Offic. Execut. cap. 17. Sect. 1.

(a) Ibid. & 12 H. 7. fol. 22.

(b) Ibid. Offic. Exec.

(c) Ibid.

(d) Ibid. cap. 16. Sect. 1.

(e) 33 H. 6. c. 31.

upon her against her Will; yet the Husband may Administer and Prove the Will for his Wife. (e) Also if the Husband (no Will being Proved) doth Administer in his Wifes right but against her Will, This notwithstanding her dissent will so bind her, that during her Husbands life she can hardly decline the Executrixship, for that by the Law of the Land she cannot be sued alone as Executrix, and being sued with her Husband she must joyn in Plea with him, whereby the Administration by her Husband will conclude her also, (f) but not so after his death, for then she may refuse. (g)

(f) 3 H. Rot. 172.
(g) 1 Eliz. Dyer.
166.

Cook. 4. Part. 61.
in Forde and
Hemblings Case.
Hughs Abridg.
Verb. Wills and
Testaments.

6. If a Feme Sole make a Will, and after take a Husband, the same is a Revocation thereof: For the making of a Will is but the inchoation or inception thereof, which hath no effect till the Testators death, Because, *Omne Testamentum morte consummatum est, & voluntas est ambulatoria usq; ad extremum vite exitum*: And therefore it being no perfect Will when she takes a Husband; and after marriage, her Will being her Husbands, and subject to it by her taking a Husband, she hath wholly revoked the Will formerly made by her.

Debt upon an Obligation, the Condition was, Whereas the Defendant had taken A. S. to Wife, who was a Widow, being posses'd of divers Goods; if he would permit his said Wife to make a Will, and to dispose in Legacies so much as she would, not exceeding fifty pound, and perform what she appointed, That then, &c. The Defendant pleaded, that she did not make a Will; whereupon Issue was joyned; it was found, that she made a Will, and thereby disposed of divers Legacies, not exceeding fifty pound, but that she was a Feme Covert at the time of the making of the Will: In this Case it was adjudged for the Plaintiff. For, although she being a Feme Covert, could not in Law be permitted to make a Will to dispose of any Goods without the Husbands assent; yet it is a Will within the intent of the Condition; for it was in the intent of the Condition, That she should make a Will to that purpose, notwithstanding the Coverture; and it is but her appointment, which the Husband by his Obligation is bound to perform; and the finding that she was a Feme Covert, was got in this Case material.

Mleh. 5 Car. in
B. R. Mariot
and Kingnan's
Case. Croo. 1.
Part. 159. and
Hughs Abridg.
Verb. Wills and
Testaments.

26 Ed. 3. 71.
Rolls Abridg.
tit. Devise G.

Pasch. 26 Eliz. C.
B. Estes vers.
Wood. Cro. par. 3.
Rk. 9.

If a Feme Covert make a Testament, and Devise Goods to another, and the Husband after her death deliver the Goods to the Devisee accordingly, it will bind him,

A Defendant Covenanted by Indenture with the Plaintiff, That whereas he intended to marry E. S. a Widow, That he would pay all the Legacies which she by her Last Will in writing, bearing date 1 May 20 Eliz. did give and bequeath, and was bound by Obligation to perform the Covenants in the Indenture. In

Debt

Debt upon the Obligation the Defendant pleaded, that after the making of the Will and the Obligation, he intermarried with the said E. S. which marriage continued till her death; so the Will and Devise of E. S. was void, and demanded Judgement, &c. And it was adjudged that the Plaintiff shall recover. For notwithstanding it was not a Will to all intents and purposes, yet the Indenture referreth to that which did bear the name of a Will; And although it was not a Will indeed, it was not material.

A *Feme Covert* Executrix may without her Husbands consent make an Executor of those Goods she hath as Executrix. Likewise she may make an Executor of the Things in Action due to her.

Mich. 8 Jac. B.
Gramm's Case,
per Curiam. Roll.
Abridg. tit De-
vise.

A Woman Covert may make a Testament if her Husband agree to it after her death. And such, albeit she be an Executrix, cannot Devise any of the Goods she hath as Executrix, without her Husbands consent or his agreement to it afterwards; yet she may make an Executor thereof without his consent. Likewise a *Feme Covert* cannot Devise things in Action which she hath, without the consent and agreement of her said Husband.

Ibid. Roll. Abridg.
tit. Devise.

If a Woman Covert die Intestate, Administration may be committed of her Goods, for possibly she had things in Action, which are not given by the Law to her Husband. D. 8 Eliz. 251. 90. Admitt.

Roll. Abridg.
tit. Executor. E.

CHAP. XI.

Of Persons Intestable by reason or for want of their Principal Senses.

HE that is both Deaf and Dumb by Nature can make no Testament or Last Will, (a) except it may appear upon good and sufficient ground that he doth understand what a Testament means, and also that he hath *Animus Testandi*; for if so, then he may by plain significative tokens and signs declare his Testament. (b) But in case he be Deaf and Dumb only by accident, he may (if he be able) write his Testament with his own hands; (c) or otherwise, not being able to write, yet having understanding, he may, as the other, make his Will by signs, else not at all. (d) Such as are only Deaf and not Dumb may make their Testaments. (e) Also such as are Dumb and not Deaf may write their own Testaments if they can, otherwise they may make them by good and sufficient signs well known to the Witnesses then present. (f) Also a *Blind* man may make a *Nuncupative* Testament

(a) L. discretis.
C. qui testa. fac.
pos. & §. item
Surdus. Inst.
quib. non est
permis. fac. test.
(b) Decius in
dict. l. discretis.
& Tyraq. de Pri-
vil. pie. Caus. c. 9.
(c) Dict. §. item
Surdus. Inst. quib.
non est per-
miss. fac. testa.
(d) Dec. & Tyr.
ubi supra.
(e) Myning. in
dict. §. item
Surdus.
(f) Dicitur in dict.
l. discretis.

(g) DD. in l.
consultiffi na
Cod. qui testa.
fac. poss.

Before the world
was gone too far
from its Primi-
tive State of pru-
dent frugality,
and when de-
bauchery was no
virtue, nor prodig-
als, nor insa-
nium libellers
were Testable, as
to the making or
proving of a Will.
L. is cui. & Gloff.
Ibid. ff. qui test.
fac. poss.
If a man crimi-
nally indicted, die
before he be con-
demned, his Te-
stament is good.
Pendente pro-
cessu capitali, non
impeditur quis
facere Testamentum.—Rub. in l.
si quis. ff. qui test.
fac. poss.

Where no property
in goods or lands,
there no ability to
Devise.

(a) Stat. 5 Ed. 6.
cap. 11.

(b) Stat. ibid. &
DD. in l. nemo.
de legib. & L. qui-
quis l. 1. c. ad leg.
Jul. Majest. & l. si
quis de injust.
Test. & Stat.

1 R. 2. cap. 2.
(c) L. si quis 6.
quatenus ff. de
injust. rupt. & in-
rit. testamentis.

(d) Stat. 32 H. 6.
cap. 34.

(e) Eliz. An. 5.
cap. 14. and tenets
of Law. verb. rob-
bery.

(f) Stat. 1 Rich.
2. c. 3.

(g) Dr. & Stud.
lib. 2. cap. 44.

(h) Quia non
prohibetur quod
non condem-

natur.

natur.

before a sufficient number of Witnesses, but not a *Written* Testament, unless the same being read to him before Witnesses he in their presence acknowledge the same for his Last Will and Testament; So that the bare acknowledging thereof to be his Last Will, without hearing the same read unto him, is not sufficient. (g)

CHAP. XII.

Of Persons Intestable by reason of some Criminal Convictions.

1. Traytors Intestable from the time of the Crime committed.
2. Felons not Intestable before Conviction.
3. Hereticks Intestable till they reclaim their Heresie.
4. Apostates Intestable.
5. Incestuous Intestable, saving to their Parents and Children.
6. Sodomites are Intestable.
7. Self-murderers Intestable under Limitations.
8. Out-Laws and Excommunicates not absolutely Intestable.
9. Outlawry in an Intestate no good Plea in Bar to a Creditors Action against his Administrator.

1. **T**RAYTORS are Intestable, for they lose both their Lives, Lands and Goods, whereof they were possessed at the time of the Treason committed, or at any time after. (a) Inasmuch that Traytors are Intestable, not only from the time of their Conviction, but also from the time of the Crime committed; So, that the Testament before made doth by reason of the conviction become void both in respect of Goods, and also of Lands, Tenements and Hereditaments. (b) Howbeit a Traytor that is pardoned and restored may make his Testament. (c) Neither shall such Goods as the Traytor hath as Executor to another be forfeited; whence it follows, that of such Goods he may make his Testament; which also extends to persons Out-law'd for Debt, also to persons attainted or convicted of Felony. (d)

2. **F**ELONS are likewise intestable being lawfully convicted, for the Law hath otherwise disposed of their Lands and Goods: (e) But if a man be only Indicted of Felony, and die before his Conviction or Attainder, he may make his Testament both of Goods and Lands: (f) Or being Indicted, and thereon Arraigned stands Mute and Dumb, and will not Answer, in this Case he forfeits only his Goods, (g) and therefore may make a Testament of his Lands. (h) And here Note, that in respect of a Felons Lands the time

time of the Fact committed is to be respected, but in respect of his goods the time of his Judgement: (i) So that he loseth his Lands from the time of committing the Fact, but his Goods only from the time of Conviction; inasmuch, that at any time before his Conviction he may bequeath, sell, or otherwise alienate his Goods and Chattels. (k.) Howbeit if he make his Testament before his Condemnation, it will be frustrated and prevented by his Judgement. (l) So that the Testament of a Felon convicted is void, though he be never Executed; void even by force of the Condemnation, (m) unless he afterwards doth obtain his pardon. (n)

3. *Hereticks*, if they be Convicted, or publickly Excommunicated, cannot make a Testament of their Goods and Chattels: (o) But if they reclaim their Heresie, they are not Intestable.

4. *Apostates*, or they who do wholly renounce the Christian Faith which once they did profess, and do become Jews, Turks, or Infidels, are worthily excluded by the Law from being capable of making a Last Will or Testament. (p)

5. *Incestuous* persons are prohibited to dispose of any Goods or Chattels by Will, saving to their Children begotten in marriage, that is, in lawful marriage; or to their Parents, Brothers, Sisters, Uncles or Aunts. (q) Where by Parents understand all of each Sex in the right Line ascending, and by Children all of each Sex in the same Line descending. (r)

6. *Sodomites*, or such as are guilty of that wicked and abominable sin against Nature, mentioned in the Holy Scripture, (s) are intestable, and prohibited to bequeath their Goods or Chattels. (t)

7. *Self-murderers*, or such as wilfully destroy themselves are intestable; (u) nor can they make any bequest of their Goods, for they are all Confiscate. (w) Yet there are Those who distinguish between the kinds, or rather the occasions of Self-murder; viz. 1. That which is occasioned through the fear of Execution of a Judgement of Condemnation. 2. That which is occasioned through a tired sense of a long, tedious and irksome life. 3. That which is occasioned through the pain and violence of some Disease. In the first case it is said they lose like other Felons both Lands and Chattels; in the second, Chattels only; in the third, neither Lands nor Chattels. (x)

8. *Out-lawed* persons, though out-lawed but in an Action personal, forfeit all their Goods and Chattels, (y) and therefore cannot make any Testament thereof: (z) But the Out-lawed for Felony, forfeiting their Lands as well as their Goods and Chattels, cannot make any Testament of either. (a) Though the Out-lawed only in an Action personal may make his Testament of his Lands, yet

(i) Perk. tit. Grants. Ed. 6.

(k) Brook, *Forfeitures* 9. 28. 65. 89. 103. 113. 117. & Cowell's Instit. par. Ang. lib. 2. tit. 12. §. 3.

(l) Panorm. in Rub. de Test. Extr. & Jul. clas. §. testa.

(m) Ib. & Graf. §. testa. q. 26. & Vass. de Success. lib. 1. §. 6. n. 18.

(n) dict. l. si quis §. quantus.

(o) Auth. Creditentes C. de Heret. & Lynwood. c. 1. de Heret. & Vass. Barr. & alii in dict. Auth. Creditentes.

(p) l. 1. 2. 3. C. de Apost. & Sem. Host. th. de Apost. §. qualiter.

(q) l. si quis C. de incest. nuptiis.

(r) Accurs. Bald. & alii in dict. l. si quis.

(s) Gen. cap. 19.

(t) Spec. de Instit. edit. §. Compendioso. nu. 5.

(u) l. si quis filio. §. ejus. R. de test. & l. 2. C. qui test. fac. poss.

(w) Vass. de Success. Resol. l. 1. §. 3. nu. 31. & Bract. l. 3. tract. 1. c. 31.

(x) Fleta. c. 56. in princip.

(y) Dr. & Stud. l. 2. c. 2. and terms of Law. verb. ut legare.

(z) Jul. Clar. §. testa. q. 19. Dr. & Stu. l. 1. c. 16.

(a) Terms of Law. verb. ut legat.

yet not so of his Goods and Chattels. And as for *Excommunicate* persons, if they be excommunicated for *Heresie*, or other cause which renders them in it self legally intestate, in such cause they cannot make a Testament, otherwise it is for the most part held they may. (b)

(b) Swinb. part.
2. §. 22.

9. An Action of Debt was brought against J. S. as Administrator of J. D. The Defendant pleaded that the Intestate was Out-lawed at the Suit of J. N. after judgement; and so being Out-lawed died Intestate. It was resolved, That the Plea was not good; for it is but a Plea by Implication, that he hath not any Goods; and so but Argumentative. (c) And *Trin. 37 Eliz.* in *C. B. Rott, 2954. Wolley and Bradwells Case* was vouched to be adjudged accordingly; and therefore the Court upon the view of the Record in *Wolleys Case* gave judgement, that in the Principal Case it was no Plea. (d)

(c) Vid. 37 H. 6.
27. by Prisot. acc.

(d) Mich. 20 Jac.
in C. B. Bullen &
Gervin Case.
Hutton. 53.

If Debt be brought against an Executor, and he pleadeth, that his Testator was and died Out-lawed; it was holden in that case, that this doth not prove a Nullity of the Will, for then he might have pleaded, that he was never Executor; but it tends only to this, that no Goods did come to his hands for satisfaction of the Testators Debt, by reason of the Out-lawry. (e)

(e) Vid. 49 E. 3.
5. 29. Aff. 63.
33 H. 6. 17. acc.
In Hughs Abridg.
Verb. Wills and
Testaments.
Mich. 43, 44. Eliz.
B. R. inter Shaw
& Cuttresse per
curiam. Roll. A-
bridg. tit. Execut.
N.
Co. 5. Marbes
Case 111. Roll. lib.

A man Out-lawed to a personal Action may make Executors; for he may have Debts upon Contract, which are not forfeited to the King. Consequently for the same reason Administration of such a mans Goods may be granted.

If an Exigent for Felony be awarded against a man, whereby he loses all his Goods, yet he may make Executors to reverse it, for there he is not attainted: So Administration of such a mans Goods may be also granted.

C H A P. XIII.

Of Conditional Testaments.

1. *When a Testament may be said to be Conditional.*
2. *What words sufficient to express or imply a Condition.*
3. *The difference between Conditio and Modus.*

1. **T**HE Testament may then be said to be Conditional, when the Executor is therein Conditionally assigned and appointed, for the assignation of the Exccutor is the Life and Soul of the Testament. Now the assignation of the Executor is conditional, when such a suspensive quality is added thereto, as thereby the effect

effect of the disposition is for the time impeded, and dependeth on some future event. (a)

2. Many and divers are the words which do exprefs or imply a condition in a Last Will or Testament, whereby the Testament it self, or the disposition of the Testator therein becomes conditional. Such are the words following; *viz.* [if, when, whiles, which, what person, who, whosoever, and sometimes the Ablative case absolute.] Also these words following, *viz.* [except, unless, otherwise, until, whensoever, as much as, in as much as, for as much as, seeing that, to which end, to the end that, for this purpose, so far as, so long as;] also prepositions, when they serve to, or govern the Accusative Case, as [By and To] yea and when they govern the Ablative Case, as [With] if it so appears to be the Testators meaning. And in a word, every part of Speech whatsoever it be, that suspendeth the disposition of the Testator in expectation of some future event, doth either exprefs or imply a Condition. (b)

3. *Conditio* is an annexed Quality, which so long as it dependeth unperformed, hindereth the effect of the disposition. (c) And *Modus* is a moderation whereby a charge or burden is imposed by the Testator in respect of some commodity, which hinders not the effect of the disposition in so strict and exact a manner as *Conditio* doth. And as *Conditio* is commonly known by the word [if] so *Modus* for the most part is known by the word [that] (d)

(a) Richard. in Rub. de Inst. & Subst. C. nu. 1. & Grass. Thef. Com. Op. §. Legatum. q. 46.

(b) Bart. in L. i. ff. de conditionib. & Demonstrat. & Mant. de Conject. ult. vol. lib. 10. tit. 5. & Richard. ubi supra. C. nu. 4. & Vafq. de Succell. progress. lib. 3. §. 29. nu. 3. in fine. & Bart. in L. si Titius. ff. quando dies Legat. cedit. & L. si ita Scriptum ff. de Legat. 2. & Ripa in l. Centurio. ff. de vulg. & pupil. Subst. nu. 160, 161. & Dyer fil. 74. nu. 16. & Alex. Confil. 185. lib. 2.
(c) Bald. & Richard in Rub. C. de Inst. & Subst.
(d) Bart. in l. quib. dieb. §. Terminus ff. de Cond. & Demon.

CHAP. XIV.

Of the several kinds of Conditions incident to Testaments.

1. *The distinction of Conditions.*
2. *The Law of Possible Conditions.*
3. *The Law of Arbitrary, Casual, and mixt Conditions.*
4. *The Law of Affirmative and Negative Conditions.*
5. *Conditions Impossible, Unlawful and Captious, are inefficual.*
6. *Necessary Conditions, of no force in Law.*

1. **A**S many and various are the words and expressions which are as the signs and landmarks of a condition: so no less manifold are the divisions and subdivisions in the Law of Conditions themselves; but as to our purpose we shall content our selves with a few, and reduce them all to these following;

viz.

viz. Conditions are either, 1. *Possible*, and they are either *Casual*, *Arbitrary*, or *mixt*; which consist either in *Chancing*, *Giving*, or *Doing*, and are either *Affirmative* or *Negative*. Or 2^{dly} *Impossible* either in respect of *Nature*, of *Law*, of *Persons*, or of *Contrariety*. Or 3^{dly} *Necessary*, and that in respect either of *Fact* or of *Law*. And thus all Conditions relating to this subject may be reduced to one of these Three Heads, *viz.* either *Possible*, *Impossible*, or *Necessary*. (a) As for *Captious* and *Unlawful* Conditions, they fall in construction of Law under the second head of this distinction.

(a) Richard. in dict. Rub.

(b) l. qui heredes. ff. de Condit. & demonst.

2. *Possible* Conditions must first be accomplished before the effect can take place, (b) unless it sticks not with, nor may be imputed to the party on whom the Condition lies, wherefore such Condition is not performed; for in such Case the Condition will be accounted as accomplished, specially if the Condition be *Arbitrary*, and the party not in *Mora* nor *Culpa* why the same is not indeed accomplished. And here Note, that every *Possible* Condition ought to be precisely observed or performed; neither is it sufficient, save in some cases, to accomplish the same by any other means, or in any other manner than is prescribed; (c) unless it may appear that the Testator did more respect the end than the means;

(c) Gloss. & DD. in l. si quis heres. C. de Inst. & Subst.

(d) Mantie. de condict. ult. vol. lib. r. tit. 16. n. 3.

(e) Simo. de Pretis. de interpret. ult. vol. l. i. fol. ult. nu. 34.

(d) or unless the party in whose favour such Condition was made doth consent unto other means; (e) or unless the Condition be when something is disposed *in pios usus*, or unless the Law allows other means than the precise form which is prescribed. And whereas it is true in Law what hath been said, That when it doth not stand by him to whom the Condition appertaineth, wherefore the Condition is not performed, it ought to be for the most part accounted as accomplished, (f) though indeed and in truth it remains unaccomplished; and whereas this is generally true when the Condition is merely *Arbitrary*, (g) and the party to whom the Condition is enjoyn'd not in fault, wherefore the Condition is not accomplished; so as that an impediment shall be said to excuse a man from delay in the matter of performance of Conditions; (b) yet notwithstanding all this, when the impediment may be foreseen and prevented, such impediment shall not excuse him who doth not avoid the same. (i) But when the impediment of performing a Condition doth proceed from the Testator himself, then the Condition is reputed for compleat though not accomplished; and in that case it shall prejudice neither the Executor nor the Legatary. (k) In like manner when the impediment doth proceed from a third person, the Condition is to be accounted in Law for accomplished, (l) unless such third person were ignorant of the Testators Will. (m) But when the performance of a Condition is hindered by the Will and Providence of God, there the Law doth not allow any feigned performance, (n) except it be in favour of

(f) l. cum non Stat. & c. impatori. de Reg. jur. (g) l. que sub Condit. §. i. ff. de Condit. Insti.

(b) DD. in l. quod te ff. si cert. pet.

(i) Gloss. & DD. ibid. & Zas. in l. continuus. §. illud. ff. de verb. Obligat.

(k) DD. in l. milites. §. ult. ad Leg. Jul. de Adal.

(l) Bart. in l. in test. ff. de Cond. & De non.

(m) Mantie. l. ii. tit. 16. nu. 22.

(n) Ibid. nu. 23.

Liberty from Bondage (o) or Alimentation, or *ad pias causas*, (p) or except the Qualification be not *Conditional* but only *Modal*. (q)

3. *Arbitrary* Conditions, that is, such as consist in his Power on whom they are imposed, ought not to be performed till after the Testators death, (r) unless the Condition be such as cannot be iterated, for in that case it is sufficient that the same was performed in the Testators life-time, even before the making of the Testament; (s) or unless the Condition be referred to the time past. (t) Also an *Arbitrary* Condition imposed upon an Executor may be performed at any time during the Executors life, and he meanwhile enjoy the Executorship. (u) This holds true, unless the Judge assign a certain competent time for the performance thereof; upon default whereof Administration may be committed as of one dying Intestate, till the Condition be performed: (w) But if such Condition doth appertain to a Legatary, then it must be performed so soon as conveniently he may, or else the Legacy is lost, (x) unless the Legatary were ignorant of such Condition or Legacy; for in that case no prejudice shall accrew to him by reason of such ignorance. (y) And it is sufficient for the obtaining the effect of a Condition, that the said Condition was once accomplished, though it doth not continue so. (z) And although *Arbitrary* Conditions (as aforesaid) are not regularly performable till after the Testators death, yet Conditions not *Arbitrary* but *Casual* or *Mixed* are accounted as accomplished, though performed before the making of the Testament, Provided the Testator were ignorant thereof: (a) But if the Testator were not ignorant thereof at the making of the Testament, then it is otherwise, and the Condition remains to be performed. (b) For when the Condition is merely *Casual*, the same is neither accounted for accomplished nor extant in presumption or fiction of Law, neither for unaccomplished or deficient, untill the actual event of the same Condition doth first come to pass. (c) Indeed an *Arbitrary* Condition is divers times accounted for accomplished in Law though not in Fact: but a *Casual* Condition is not accounted for accomplished or extant in Law, unless the same be accomplished in fact also. (d) And such must be accomplished before a Legacy can be due: And in case the Legatary happen to die before the accomplishment of such *Casual* Conditions, the Legacy is quite lost and cannot be transmitted to the Executors or Administrators of such Legatary. (e) And in *Mixed* Conditions it is in this case as in Conditions that are merely *Casual*. (f)

4. Again, of the *Possible* Conditions some be *Affirmative*, some *Negative*; when the Condition is *Affirmative*, the Executor or Legatary cannot obtain the Executorship or Legacy so long as *Affirmative* Condition dependeth unfulfilled, though they should put

(o) l. libertatem ff. de Manum.

(p) Tyraq. de Privil. piz. Ca. c. 57.

(q) Graß. Theß. Com. Op. §. Legat. q. 58.

(r) l. 2. ff. de Cond. & demon. & l. si quis heredem. C. de Instit. & Substit.

(s) l. si jam facta. & l. hæc conditio. ff. ibid.

(t) l. talis. ff. ibid. & l. si quis instituitur. §. 1. ff. de hered. Instit.

(u) Bart. Bald. & Paul. de Castro. in dict. l. si quis & dict. §. 1.

(x) l. hæc conditio. ff. de Cond. & demon.

(y) Bald. in l. r. C. de Instit. & Substit. nu. 20.

(z) Bart. in l. Substit. ff. de vulg. Substit.

(a) l. si jam facta. ff. de Cond. & l. si quis heredem. C. de Instit. & Substit.

(b) l. si ita Scriptum ff. de Legib.

(c) l. unica. §. fin autem. C. de Cad. tol.

(d) Ibidem.

(e) l. liber. §. si ita. ff. de hered. Instit. & Substit.

(f) Dict. l. si quis heredem. C. de Instit. & Substit.

(g) l. Mutian. ff. de Cond. & dem.
(h) l. pater. §. Socrus. ff. ibid.

(i) l. r. c. de his que sub modo &c.

(k) l. Mutian. ff. de Condit. & demon.

(l) Ibidem.

(m) l. cum tali. §. 1. ff. ibid. & l. pater. §. Socrus. ff. ibid.

(n) Gloss. & DD. in dict. l. Mutian.

(o) Ibidem.

(p) l. hoc genus. ff. de Cond. & demon.

(q) Mantie. de Consect. ult. vol. lib. 11. tit. 16. n. 23.

(r) l. illi. ff. de hered. instit.
(s) l. fidei commi. ff. de fidei commiss.

in sufficient bond to make restitution in case the Condition should be deficient, (g) unless such *Affirmative* Condition doth secretly imply or contain a *Negative*, (h) which consisteth in *Doing* or *Giving*; or when the Disposition is not made *sub Conditione* but *sub Modo* only: (i) But when the Condition is *Negative*, the Party on whom the Condition lies may be admitted to the effect of the Condition in the mean time, or during the dependance of such *Negative* Condition, he first entering into Bond or Caution to make restitution in case the Condition be not performed. (k) For if the Condition be *Negative*, consisting in not *Doing* of some thing, and cannot be performed so long as the person liveth, on whom it was imposed, then may he obtain the Legacy by giving in caution to accomplish the Condition, or not to do that which by the Condition was prohibited; otherwise in default thereof to make full restitution. (l) But if the *Negative* Condition be such as may be performed during his life on whom it is imposed, then is not such caution to be given. (m) And if ever a *Negative* Condition be reduced to an impossibility, it is then accounted as accomplished, (n) because it is then brought into such a state as that it is not capable of being infringed. Also if the *Negative* Condition consist in not *Chancing*, then likewise is the foresaid caution not to be admitted. (o) Lastly, when the Condition is *Affirmative*, then it is to be understood of the first Act of performance only; but when the Condition is *Negative*, then not only the First Act, but also Second, Third, and every other Act is perpetually forbidden. (p)

5. *Impossible* Conditions, be it in either of the four former respects, viz. either in respect of Nature, of Law, of Persons, or of Contrariety or Repugnancy, are in themselves void; and work nothing as to any hinderance either of Executorship or of Legacy; But the Condition which was not impossible at first, yet becoming impossible afterwards, is not void in it self, yet maketh void the disposition whereto it is annexed. (q) Also under this head fall all unlawful Conditions, and such as are contrary to good manners; for what is unlawful to be done, the Law will have us to understand as impossible to be done; and not only Conditions simply unlawful, but also all *Captious* Conditions; for when the Condition is repugnant to the nature of the disposition it self, it is then a *Captious* Condition, and is of no force; for all *Captious* Conditions are void; so are all *Captious* Wills and Testaments; as when the Testators will dependeth on the Will of another, it is a *Captious* Will, and of no validity, (r) unless it be in favour of Liberty, or *ad pios usus*. (s)

6. *Necessary* Conditions are all of no force, whether they be necessary in respect of *facti*, or such as cannot but come to pass, or whether

whether they be *necessary* in respect of Law; for in vain doth the Testator annex that as a Condition to the disposition, which the Law requires without: for as in construction of Law, that is deemed as impossible which the Law prohibits; so likewise is that deemed as necessary which the Law absolutely requires; therefore when the Condition is in either extremum, that is, either necessary or impossible, such hindereth not as to any suspension of the effect, but it is as if any such Condition had not been at all expressed. (†)

(†) l. si pupillus.
§. qui sub Condi-
tione. De Novat.

C H A P. XV.

Of Testamentary Conditions in reference to Marriage.

1. Conditions against the Liberty of Marriage, Unlawful.

2. Condition of Marrying with the Consent of another born Lawful, or not.

1. **A**Ll Conditions against the Liberty of Marriage are unlawful; (a) but if the Conditions are only such, as whereby Marriage is not absolutely prohibited, but only in part restrained, as in respect of time, place or person, then such Conditions are not utterly to be rejected. (b) Thus an Executor or a Legatary made on some Condition against the Liberty of Marriage, may notwithstanding the non-performance of such Condition obtain the Executorship or Legacy: (c) Yea if the Testator make one his Executor, or give him a Legacy upon condition that he marry with the consent, and according to the good liking or appointment of some other person, this condition is unlawful. (d) Inasmuch, that if such Executor or Legatary marry contrary to such restraint or condition, he shall notwithstanding be admitted to the Executorship, and receive the Legacy, as if no such Condition had been expressed. (e)

2. Notwithstanding what hath been said, the Condition holds good, if the Testator make one his Executor, or give him a Legacy if he marry not without the Counsel or Advice of another person; so that the Testator giving him a Legacy if he marry with the Counsel or Advice of another person, he is excluded from the Legacy, if he marry without such Counsel or Advice; (f) yet in this case he is not bound to follow such counsel or advice, but only to request the same. (g) Again, although the condition of marrying with the consent of another is void, so as the party on whom such condition is imposed, may obtain the Legacy

(a) Viget. Method. Jur. Civil. part. 4. l. 14. c. 3.

(b) l. cum ita. & l. hoc modo. & l. sed si. §. cum vit. si de Cond. & demon.

(c) l. quoties. ff. ibid. & l. 2. C. de Indict. vid.

(d) l. cum tale. §. li arbitratu. ff. ib. & Gravet. Confil. 1. n. 3. & Mant. l. 11. tit. 18. m. 3. (e) Gravet. & Mant. ibid. & Perkins de Test. Conjug. l. 1. c. 24. n. 6.

(f) Mantie. ubi supra.

(g) Paul. de Cast. Conf. 300. vol. 12. & Felin. in c. 10. part. de Constat. Ext. Col. 2.

without such consent, yet marry he must, or he cannot obtain the Legacy; for although the condition of such Consent be unlawful, yet must he marry before he can pretend to the Legacy, because that part of the Condition is not unlawful. (b)

(b) Mant. de
Consect. ult. vol.
l. 1. tit. 18. n. 8.

C H A P. XVI.

Of the manner of Proceeding during the suspense of the Conditions.

1. *The Condition depending, Administration may be committed to the Conditional Executor.*

2. *The Law what, in case the Condition be not performable by the Executor, on whom it is imposed.*

1. **T**HAT Creditors and Legataries may have Remedy during the suspense of the Condition of the Executorship or Legacy, it is lawful for the Judge to commit Administration to him that is conditionally assigned Executor, yet only for so long time as the Condition dependeth and is not extant or else deficient; (a) and when the Condition is extant, he may Prove the Will and detain the Goods of the deceased, as Executor to the Will; but if the Condition be infringed or utterly deficient, then ought he to make restitution to the next of Kin to the deceased, or to those to whom belong the Administration of his Goods; (b) for by breach or defect of the Condition the deceased is reputed to have died intestate, or as if he had never made an Executor; (c) And the former Administration being forfeited, a new may be committed: (d) But if the Conditional Executor will not meddle with the Administration of the deceased's Goods when the Condition is performable, then may the Judge assign the Conditional Executor a competent time for the accomplishment of the Condition, within which time if it be not performed by him, and if it be within his power, it may be imputed for infringed or deficient, Provided that other time for the performance of the Condition be not assigned in the Condition it self. (e) And in case of such infringement or deficiency Administration may be committed according to the Statute as of one dying intestate. (f) But if the Judge knowing of this Will doth commit Administration to some other without the Executors knowledge, or without appointing him some competent time for the accomplishment of the Condition, then is the Administrator in hazzard of being sued by the Executor in an Action of Trespas, unless the Executor did formerly refuse. (g)

2. If

(a) l. si quis instituat. §. 1. 2. ff. de hered. instituend.

(b) l. 2. §. si sub Conditione. ff. de honor. possell.

(c) l. heres. ff. de acquir. heredit.

(d) l. si quis instituat. ff. de hered. instituend.

(e) Bart. Bald. & Paul de Castr. in ff. de hered. instituend.

(f) Stat. 21 H. 8. c. 5.

(g) Abridg. dez Cal. Edit. Anno 1599. tit. Administrator. fol. 183. n. 1.

2. If the Condition be such as that it doth not lie in the power of the Executor to perform the same, then may the Judge at the Petition of the Creditors assign a time to such conditional Executor to undertake the Administration of the Goods, which if he neglect or refuse, then may the Judge after such time elapsed commit the Administration to such as have Interest, untill such time as the Condition be either extant or deficient; or else (as some think) the Judge may grant a Letter *ad Colligendum* to some other person than the conditional Executor. But then Note, that such person as hath such Letter *ad Colligendum*, not being Administrator, the Actions which otherwise might be brought against the Administrator, may now lie against the Judge. (b) And though the Judge may grant his Letter *ad Colligendum*, yet he hath not power to give Authority to sell any of the said Goods though perishable. (i) And if such person to whom such Letter *ad Colligendum* is granted, should by virtue of such Power sell any of such the said Goods, he is suable as Executor to his own wrong. (k)

(b) *Terms of Law. verb. Administr. & Broo. Abridg. tit. Ordinaril. nu. 12. & Abridg. de Casib. fol. 176. nu. 12.*

(i) *Dyer. fo. 236. & Abridg. ibid.*

(k) *Dyer. ubi supra.*

CHAPTER XVII.

Of Testaments void.

1. By what means Testaments are void Originally.
2. By what means they become void afterwards.
3. Law-Cases pertinent to this matter.

1. A Testament may be Originally void or voidable wholly or in part through some original defect: as thus; First, because the Testator is such a person as cannot make a Testament. (a) Secondly, because the things bequeathed are not deviseable by Will. (b) Thirdly, because the manner of the disposition is unlawful. (c) Fourthly, because the person made Executor is incapable thereof. (d) Fifthly, because the Testator was compelled by fear, (e) or circumvented by fraud, or overcome by immoderate flattery, (f) or induced by some other unlawful means to make his Will. Sixthly, because of error, uncertainty or imperfection. Seventhly, because the Testator had not *Animum Testamentandi*. (g)

2. A Testament, though free from all Original fault, may yet afterwards become void. As first, by making of a later Testament. (b) Secondly, by cancelling or revoking that which is made. (i) Thirdly, by some alteration of the state of the Testator,

(a) *Supra. cap. 70.*

(b) *St. 27 H. 8. c. 10. & Dr. & Stu. L. i. c. 8. & Perh. tit. devise 102.*

(c) *Supra. cap. 14. §. 5. 6.*

(d) *Infra. lib. 2. cap. 6.*

(e) *Bart. in l. fin. §. si quis aliq. testari prohibetur.*

(f) *Oldend. de Actionib. cl. 5. fol. 518.*

(g) *l. Luchis. & l. Divus. de Mil. lit. Testa.*

(b) *§. posteriori. Inst. quib. mod. testa. infirm.*

(i) *l. 1. §. de his qui test. del.*

(k) Gallo. Inst. quib. mod. testa. infirm.
(l) l. r. & 2. ff. si quis aliq. testari prohibetur.

A man maketh a Testament with- out naming any Executor. This is good for Land, but not for goods. Dyer's Read. in Stat. of Wills, Sect. 2. §. 3.

Trin. 36. & Mich. 36, & 37 Eliz. Darnhall vers. Caterby, Moo. Rep. nu. 483.

The Case of the Coheirs of Sir William Rider, in the Court of Wards, Moo. Rep. nu. 1222.

tor. (k) Fourthly, by forbidding or hindering the Testator from making another Testament, or from correcting the former. (l) Fifthly, by unwillingness or inability of him that is appointed Executor, when he will not or cannot officiate as Executor. Sixthly, when the Executor cannot be certainly known, there being divers men of that name and no distinction made; this uncertainty of the Executor maketh void the Will. Seventhly, when the Testator doth err in the person of the Executor; but in an error of the Name only, and not of the Person it is otherwise, save in certain Cases hereafter limited. Thus a Testament, though free from all Original fault, may yet afterwards become void; but a Testament originally void, can never afterwards be made good.

3. Error upon a Judgment given against the Plaintiff in C. B. on a *Formedon* in Remainder, upon special Verdict, and found that D. gave instructions for the writing of his Will, to give his Lands to one of his Sons for life, and the Scrivener by mistake wrote an Estate in Fee; and the Court agreed that the Will was utterly void, because it was not the Will of the Testator. Yet it seem'd to *Fenner* Justice, that for so much as it may be, it should be; that is, for an Estate for life, which was his Will: but all the other Justices were against him.

In the Court of Wards between the Co-heirs of Sir *William Rider*, it was declared by *Coke* Chief Justice of the C. B. and *Tanfield* Chief Baron, That if one make his Will in writing, and then sayes, I will alter it, or add to it; that is not his Will, because it is not compleat, or finish'd, nor publish'd for his Will, but is deferr'd or delayed till the Alteration or Addition be made to it. And if the party die before such Alteration or Addition, and without publishing it to be his Will, that Will is not his Will. But if he make his Will, and publish it, and after it come to his mind to alter or add to it, and he say that he will alter it, or add to it, but dies before he make any Alteration or Addition, then the former shall be his Will.

C H A P. XVIII.

Of Testamentary Revocations.

1. The several kinds of Revocations.
2. Revocations by Marriage.
3. Where two Wills are found, and it be not known which was made First or Last, which shall be presumed the Latter Will.
4. In what cases the former Will stands unrevoked, notwithstanding the making of a Latter Will.
5. Cases in Law touching Revocations.

Revocations may be either of Executorship or of Legacies, and that either in whole or in part; and this may be either by Word or by Deed, or by Act and Operation of Law, or by Marriage. The Testator at any time before his death hath power to revoke or alter his Will at his pleasure. (a) And as a Will may be made by word only, so even a written Will may by word alone be revoked and annulled. (b) For by making a Nuncupative or Verbal Will one may revoke a written Will; yea one may by word only express the alteration of his mind thus far, That the Will by him formerly made, shall not stand but be revoked and annulled; and this shall stand and be effectual; (c) So that if he then die without making a new Will or new publication or re-affirmance of the former, he dieth intestate. But a Will advisedly made shall not be nullified by doubtful speeches of the Testator without clear and perspicuous Revocation, or words which *tant amount*. (d) Nor can there be a Revocation of Legacies among Children without precise mentioning the first Will, and the Legacies thereby given to the Children. The Law is the same, when the Testator having no Children deviseth Legacies to his Brothers. (e) And as a Will may be wholly revoked, so also in part only. Also the Executorship of one or more of the Executors may wholly or in part be revoked, and yet the Will may stand good in all the other parts, so as there be any one or more Executors left unrevoked; but if all the Executors be revoked, then the whole Will is revoked. And this revocation (as aforesaid) may be by word only without being expressed in the Will, or any other writing. (f) Likewise Revocations may be by Act and operation of Law as well as by Fact or by any direct and express terms; as thus, when the Testator maketh a Feoffment to one man of the same Land by Deed, which he had formerly devised or bequeathed to another by Will. (g) Also if one bequeath his black horse by Will, yet afterwards selleth or giveth him away, and buyeth another

(a) Bald. in l. Sancimus. C. de Testa. & Mant. de Conject. ult. vol. 1. 2. t. 15.
(b) Offic. Exec. §. de Revocat.

(c) Ibid.

(d) Crok. Rep. Caf. Eyre vers. Eyre in C. B.

(e) Ibid.

(f) Bald. Paul. de Castr. Mantie. Alex. Jason. Dyn. cum multis aliis.
(g) 6 Ed. 6. Dyer. & Goldsb. Rep. in Caf. Gibson vers. Platons. & Crok. Rep. in Caf. Hodgkinson vers. Whood. in C. B.

another black one; this latter black horse shall not pass by the Will, because the Testator had him not at the time of making the Will, as also because such his sale or gift of the former black horse was an *actual* revocation of his Bequest or Legacy thereof.

(b) Offic. Exec.
ubi supra.

(b) The like of Corn in the Barn, or other thing whereof the Testator makes any Act of Alienation contrary to the disposition thereof in his Will. Lastly, although a Testator may by word revoke a Will made in writing that is good, yet he cannot by word affirm a Will made in writing that in it self is void.

(c) Ibid.

2. There are likewise *Revocations* by Marriage; as thus, If a Woman Sole make a Will, and afterwards take a Husband; this without any more shall work a Revocation or Annulment. (i) But in case the Husband be Bound or Covenanted to make good or perform the Womans Will, which if he afterwards refuse to do, his Bond or Covenant stands good against him, and is also Suable. (k) Yet a married Woman cannot by word countermand and revoke her Will formerly made when she was Sole and unmarried, by reason of the Coverture taking away the freedom of her Will. And if the Husband doth give his Wife Licence to make a Will of his Goods, yet he may revoke the same, not only at the making of the Will, but also after her decease, at least before the Will be Proved. (l)

(k) M. 25, 26
Eliz.

(l) Supra, cap.
20. §. 2.

(m) L. quærela-
tur. ff. de mili-
tari Testa.

3. No man can properly be said to die with two Testaments, except a Field-Souldier in *actual Service*: (m) yet a man may make two Testaments, and both stand good, and both be proved, provided they be of and as touching distinct and several things, and the Executors thereof limited accordingly, and the one no way derogatory to the other; (n) But of the same things there can be but one Will, for the Last rescinds all former Wills. (o) Yet a man may die with divers Codicils, and the latter doth not infringe the former, so long as they be not contrary the one to the other. (p) But if two Testaments be found, and it appear not which was the latter, both are Null and Void: (q) yet if one of them be made *inter Liberos*, or *ad Pios Usus*, that shall be presumed to be the latter, and so take place; yea, or if one of them be made in favour of such as ought to have had the Administration in case of intestation. (r) But if one of them be in favour of the Testators Children, or of them that ought to have had the Administration, and the other be *ad pios usus*, In this case if they that should have had the Administration be the Testators Children, then that shall take place; (s) yet that *ad pios usus* shall have priority of a Testament of the same date made in favour only of collateral Kindred. (t) But if two Codicils be found, not appearing which was made First or Last, and one and the same thing be given to one person in one Codicil, and to another

(n) Offic. Exec.
(o) l. posteriore.
Inst. quib. mod.
Testa. infir.

(p) l. cum pro-
ponat. C. de Co-
dicil.
(q) l. ult. & ibi
DD. C. de Edict.
Divi Adrian.

(r) Richard. in
dict. l. ult. &
Mant. l. 2. t. 25.
n. 17.

(s) Mant. lib. 6.
tit. 3. nu. 43.

(t) Idem per l.
Sancimus. c. de
Sacrosanct. Eccl.

other

other person in the other Codicil, in this Case the Codicils are not void; but the persons therein made Legataries ought to divide the bequest equally betwixt them. (u)

4. The former Will shall stand good and unrevoked notwithstanding a later Will, in case the later Will be voidable by any wayes or means whereby Wills become void, and the former be without any such just exception; (w) or in case it be justly suspected that the Testator was circumvented by fraud, or compelled by violence to make that later Testament: (x) Or in case in the former Will there be inserted a clause derogatory of not making any other Testament, and sufficient mention, or expresse revocation thereof be omitted in the later; (y) For if in the former Testament there be a clause derogatory of Wills and Testaments afterwards to be made; as if the Testator sayes, Whatsoever Testament I shall hereafter make, I will the same to be void and of no force: In this case it is not infringed by a later Testament, unless in that later there be mention thereof sufficiently made to amount unto a legal revocation of that former Testament or clause derogatory. (z)

5. If a man saith, that he will revoke his Will hereafter which he hath made, that is not any revocation, without the doing of some other Act. Likewise, if one saith that he will make a Fcoffment thereof to another, that is no revocation before it be done: But if a man Devise Land to another by his Will in writing, and after Devise it unto another *per paroll*, albeit that is void as a Will, yet it is a revocation of the former Will.

If a Devisor alien the Land Devised, and afterwards repurchase the same Land, yet the Will is revoked as to that Land. 44 Ed. 3. 33. 44. Ass. D. 3, 4 P. M. 143. 55. Contra. 2 R. 3. 3. b.

Trespas upon evidence, where one hath made his Will in writing, and devised his Land to A. and her heirs; and afterwards being sick and lying upon his death-bed (because A. did not come to visit him) affirmed that A. should not have any part of his Lands or Goods. It was held by all the Court, that it was not any revocation of his Will, being but by way of discourse, and not mentioning his Will. But the revocation ought to be by expresse words, that he did revoke his Will, and that she should not have his Lands given unto her by his Will, or such like words which might shew his intent to make an expresse revocation thereof.

Ejectione Firme. Upon evidence to a Jury it was resolved by the Court, and so delivered to the Jury, that if one makes his Will in writing, of Land, and afterwards upon Communication saith, *That he hath made his Will but it shall not stand; or, I will alter my Will, &c.* These words are not any revocation of the

(u) Gloss. & DD. in l. cum prop. nat. C. de Codicil. & Graff. Thef. Com. Op. 6. Codicillus.

(w) 5. ex eo. Inft. quib. mod. Testa. infirm. & l. Sanctus. C. de Test.

(x) Sino de Practis. de interpretatione ult. vol. lib. 4. fol. 226. nu. 46.

(y) Gloss. in l. si mihi & tibi. ff. de Legibus.

(z) Ibid. & Justin in l. Horatius. ff. de Liber. & posthum.

Mich. 38. 39 Eliz. B. R. per Popham. Roll. Abridg. tit. Devise. P.

Roll. Ibid. R.

Pasch. 4 Jac. B. R. Symphon vers. Kinton. Cro. Rep. par. 2. Pl. 2.

Mich. 16 Jac. B. R. Finabugh Cranuel vers. Sanders. Cro. Rep. par. 2. Pl. 3.

Will, for they are words but in *futuro*, and a declaration what he intends to do; but if he saith, *I do revoke it, and bear witness thereof*; he doth hereby absolutely declare his purpose to revoke it *in presenti*, and it is then a revocation: Also *Mounaigne* said to the Jury, and it was not denied by any other of the Justices, That as one ought to be of a good and *sane memorie* at the disposing, so ought he to be of as good and *sane memory* when he revokes it; And as he ought to make a Will by his own Directions, and not by Questions; so ought he to revoke it of himself, and not by Questions.

C H A P. XIX.

Of a Reviver of a Will Revoked.

1. *How a Will Revoked may be Revived.*
2. *How an Executor Revoked may be Revived.*
3. *How one may dye both Testate and Intestate.*

1. **O**F a Will Revoked there may be a Reviver by a new publication of that revoked Will; also a Will revoked may without making a New Will be revived and set on foot again by annexing a Codicil thereunto, (a) or by adding any thing to the Will; or by making a new Executor; or by express speech and word, that it shall stand good and be his Will, yea, and sometimes without either of these; as thus, A man makes his Will, many years after he makes another, then in his sickness both these Wills are put into his hands, and being demanded which of these Two he will have to stand for his Last Will and Testament, and being required to deliver back that which he will have to stand, and to detain the other in his hands, he delivers back the Will he first made possibly many years before the later; In this case the former Will, though once made void by the later, is now revived again, and shall stand as the parties Last Will and Testament. (b)

(a) *Traict. de
Offic. Exec. & de
son Publicat.*

(b) *Ibid. & 44
Ed. 3. fol. 33.*

2. If one of the Executors Names be stricken out of the Will, and afterwards a [*ster*] be written over it by the Testator, or by his appointment, he is then a revived Executor; but then Note, that if the [*ster*] shall stand good, the Executors Name over which it is written, ought not to be so blotted out but that it may be read and discerned, otherwise the [*ster*] is over nothing at all. Or if the Testator express by word in the presence of witnesses, that the party put out shall yet be Executor, he is then also a revived Executor. Lastly, if the verbal re-affirmance renew the

Executorship,

Executorship, then is the Will partly in Writing partly Nuncupative, his Name not being to be found in the written Will; for the appointing of the Executor doth create the Will, though it hath not life till the Testators death; which is Divinity as well as Law. (c)

3. If a man seized of Lands in Fee-simple, dispose of the same, or part thereof by his Will in writing, it shall stand good for the whole or part according to the difference of Tenure, though no Executor be named or appointed; (d) so that the party shall die Intestate as touching his Goods, whereof Administration is to be committed, (e) yet shall have a Will as touching his Lands, because Land is not properly Testamentary. (f) And so a Will may be good in part only. (g) But where the strictness of the Civil Law is observed, there a man cannot die partly Testate and partly Intestate; (h) though here in England where that Ceremonial strictness is not observed, but all immunities enjoyed, being not obliged to any other observance in making of Testaments than what is *Juris Gentium*; (i) a man may thus and several other wayes die partly Testate and partly Intestate. (k)

(c) Heb. 9. 16, 17.

(d) Ratio est Stat. 32 H. 8. c. 7.

(e) Stat. 1 Ed. 4. c. 11.

(f) Offic. Exec. c. 1. §. 1.

(g) Goldsb. Rep. in Cas. Gibbon vers. Plaflopi.

(h) Dec. Cognol. & Hier. Fran. in l. jus nostrum. ff. de Reg. jur.

(i) Tract. de Rep. Angl. lib. 3. c. 7.

(k) Broo. Abrid. tit. Exec. & Plow. in casu inter Greib. & Fox. & Socin. Reg. & Falten. Reg. 495. ubi 23 Casus in quib. pot. quis decedere pro parte Test. & pro parte Intestatus.

CHAP. XX.

Of the Probate of Testaments.

1. Where, and before whom the Will is to be proved.
2. By whom, and at whose instance the Will is to be proved.
3. When is the Will to be proved.
4. How and in what manner is a Will to be proved.
5. What are the Fees upon Probate of a Testament.
6. Touching refusal to prove the Will.

1. **E**VERY Last Will and Testament after the Testators death ought to be duly Proved before a Competent Judge in the Ecclesiastical Jurisdiction: A Testament or Last Will is to be Proved before the Bishop of that Diocese within which the Testator had his Domicil or Habitation, or before his Official; unless by Custom or Prescription within certain Lordships or Mannors it appertains to the Chief Lord; (a) or unless the Testator died within some peculiar Jurisdiction, in which case the Probation of the Testament may by Prescription or Composition belong to the Judge of the peculiar; (b) or unless the Testament be such as wherein only Lands, Tenements, and Hereditaments and no Goods be devised; or unless the Testator had *Bona Notabilia* at his death

(a) Fitz. tit. Testam. nu. 2. & Dr. & Sta. l. 2. c. 28.

(b) Jo. de Atho. in Legat. Libertat. de Execut. Testa. verb. Ordinario.

(c) Linw. in c.
Statut. verb. ad
quos pertinet. &
Perk. tit. Testam.
fol. 94. & Fitzh.
Abridg. tit. Adm.
n. 7. & Brook.
eod. tit. tit. 48.
(d) Dr. & Stu.
ubi supra. & Per-
kins ubi supra. &
Frañ. de Rep.
Anglicana. l. 3. c.
7. & 21 H. 8. c. 5.
(e) Offic. Exec.
c. 4. §. 1.

(f) 2 R. 3. Fitz.
4. Coke lib. 9. fol.
43.

Co. 9. part. Hen.
flect. Case.

in divers Diocesses; in which Case the Probation of the Testament appertains to that Arch-Bishop within whose Province such *Bona Notabilia* are; (c) Or unless by Custome it appertains to the Major of some Borough; for ordinarily and regularly though Wills and Testaments are to be Proved before the Judge of that Jurisdiction within which the Testator died, or rather within which he had his usual habitation and made his last aboad, (d) yet some Testaments may be Proved in some Boroughs before the Major thereof by Custome; where it shall be understood to be only in respect of the Burgages within such places deviseable, but in respect of their Goods they shall be Proved according to the Law *Communi Formâ*; (e) and there only where the Lands are bequeathed; which is nothing strange, when as aforesaid in some Manors by Prescription Testaments may be Proved before the Stewards thereof, yea though no Lands be bequeathed therein. (f)

The Probate of Testaments did belong to Ordinaries but of later Times, *de Consuetudine Angliæ & non de Communi Jure*; and the power to grant Administration was granted to the Ordinary, by the Stat. of 31 Ed. 3. cap. 11. And before that time, the King was accustomed to seize the Goods of the Intestate, to the intent they might be bestowed for the burial of the dead, and the payment of the Intestates Debts, and the advancement of his Wife and Children; and the Ordinary himself hath not power to sell the Goods of the Intestate, though they be in danger of perishing, nor release a Debt due to the Intestate; by the Stat. of 31 Ed. 3. The Commissary of the Bishop of the Diocess granted Letters *ad colligendum & ad vendendum ea qua peritura essent, & inde com- putum reddere*; the Grantee sold Goods which would not keep, but perished; and an action of Debt was brought against him as Executor in his own wrong, and it was adjudged maintainable, because the Ordinary himself had not such power; and therefore he could not give it to another, 7 Eliz. Dyer, 256. Again, the practice hath been when Testaments have been Proved before or other than such as are mentioned in the Premises, as appears by this Case. A Testament is disproved in the Ecclesiastical Court, and the party appeals to the Metropolitan, and it is there disproved, and afterwards there is an Appeal to the Court of Delegates, and it is there disproved also; and at last the party appealed to the Queen in Chancery, by the Stat. 25 H. 8. and there also it was disproved before the Commissioners: And if the Queen *ex Auctoritate sua Regali* might grant Letters of Administration, was the Question. The Opinion of the Justices of the Common Pleas, was, That she might, because the said Court of Chancery is the Highest Court; and the matter being once there it cannot be de-
termined.

terminated in any Inferiour Court : and then the party may shew in his Declaration generally the matter, and that Administration was granted to him by the Queen *Ex sua Regali Autoritate*, under the Seal of the Court of Delegates. *Mich. 24 Eliz. in C. B.* See after, 10 *Jac. in B. R. Stephenson's* Contrary. That the Court of Delegates cannot grant Letters of Administration.

Godbolt.

A Lessee for years of Lands, by his Last Will Devised his Term to one whom he made his Executor and died; the Devisee entered before any Probate of the Will, and held the Land for a year and more without any Probate, and then died. The Question was, whether his Executor or Administrator should have the Term, or that the Ordinary should commit Administration of the Goods of the first Testator? It was the Opinion of the Court, That the property of the Term was lawfully in the Executor by his Entry, and the Devise well executed without any Probate.

Mich. 23 Eliz. Dyer 367. Hughes Abridgm. verb. Wills and Testaments.

In Debt against Executors, it was Resolved, That if any of the Executors refuse before the Ordinary, yet he that refused may Administer the Testators Goods at his pleasure, and Prove the Will; but if all the Executors do refuse before the Ordinary, there Administration shall be granted, and they cannot after Administer. 2. That in Debt brought against an Executor, it is a good Plea, That the Testator made him and another Executor, who is alive not named, without saying that the Testament is Proved. 3. Resolved, That the Lords of Mannors in former times had the Probate of Wills in their Courts; and in ancient time when a man died Intestate, and had made no disposition of his Goods, the trust of them was committed to the King, who was and is *Patris Patrie*. And the Ordinary was Constituted by the King *in loco Patris*, and his Power was given to him by the Stat. of 31 E. 3. cap. 11. 4. Resolved, that although the Ordinary had the Power given to him as before, yet no Power thereby is given to the Ordinary to sell or dispose of the Goods either to his own use, or to the use of any other; and that he hath not any absolute property in the Goods, but a property only *secundum quid*.

Vid. Cook. 9. Part. 37, 38. in Hanstee Case. vid. Hughes Abridgm. verb. Probate of &c.

2. The Testament is to be Proved by the Executor (g) whom the competent Judge either *ex Officio*, or at the instance of the interested may call before him to Prove the same, and to declare his acceptance or refusal of the Execution thereof; (h) yea some think it may be done at the instance of such as have no interest, to the intent that thereby they may be certified whether the Testator left them a Legacy. (i) And because it often happens that a Last Will or Testament is left in the Custody of some other Friend than the Executor, the Law hath provided, that in whose hands soever it remains, he is compellable to produce the same, and to exhibit such Testament. (k) And if he once had it, the Law pre-

(g) *Perk. tit. Test. fol. 93.*

(h) 21 H. 8. c. 5. & l. 1. ff. quem admodum test. approba. & l. Bart. Bald. & Ang. in dist. l. 1. (i) *Glof. & Bald. in l. 2. ff. ibid. in princip.*

(k) l. 1. in prin. & l. 1. hoc inter d. ff. de Tab. exhib.

sumes.

(l) Alex. in l. 2.
C. de Test. nu. 3.
verb. Tamen.

sumes him to have it still, untill he prove the contrary by good evidence, or by his own oath at least. (l) Also an Executor dying before he hath Proved his Testators Will, his Executor (that is) the Executors Executor may not Prove both the Wills, and so become Executor to both the Testators; but in case the Goods of the first Testator were after Debts paid bequeathed to the first Executor, then may his Executor take Administration of the first Testators Goods with the Will annexed.

3. The time when the Will is to be Proved is somewhat uncertain, and left to the discretion of the Judge, according to the distance of the place, the weight of the Will, the quality of the Executors, the absence of the Witnesses, the importunity of Creditors and Legataries, and other circumstances incident hereunto.

(m) l. 2. §. utrum.
et quemadmod.
Testam. approb.

(n) Fulb. Par.
par. 2. Dialog. 3.
fol. 32.

(o) 9 Ed. 4. 33.

(m) Yet regularly Testaments ought to be insinuated to the Official or Commissary of the Bishop of the Diocese within four months next after the Testators death. (n) And the Ordinary may sequester the Goods of the deceased untill the Executors have Proved the Testament; so may the Metropolitan if the Goods be in divers Diocesses. (o) Also the Ordinary may compell the Executor to Prove the Will, and to accept or refuse the Administration: if the Executor refuse, or if there be a Will made and no Executor appointed, the Ordinary must commit Administration *cum Testamento annexo* to whom he shall think fit, and take Bond of the Administrator to perform the Will. If no Will be made, he must grant Administration to the next of Kin; if they refuse it, then to whom shall desire it; and if no body take the Administration the Ordinary may grant Letters *ad colligendum bona Defuncti*, and thereby take the deceased's Goods into his own hands, wherewith he is to pay the Debts and Legacies so far as the Goods will reach; (p) for which himself becomes liable in Law like other Executors or Administrators.

(p) 31 Ed. 3. c.
17. & 15 Ed. 1. c.
29. & 21 H. 8.
cap. 5.

4. A Testament after the Testators death and not before may be Proved either in *Common Form*; as when the Executor presenting the Testament before the Judge, without citing the interested, doth depose the same to be the true, whole, and Last Will and Testament of the deceased, and whereupon the Judge doth annex his Probate and Seal thereunto: Or in *form of Law*, as when the Widow or next of Kin to the deceased are cited to be present, in whose presence the Will is exhibited before the Judge, whereupon Witnesses being produced, received, sworn, examined, and their depositions published, the Judge in case of sufficient proof doth pronounce for the validity of the Testament. (q) Now he that Proves but in *Common Form*, may be compelled to Prove the same again in form of Law; but being once so Proved the Executor is not compellable to Prove it any more; (r) but being Proved only in

(q) Est. in l. 2. c.
de Testa. nu. 2.
& Richard. Ibid.
& Alex. & Paul.
de Cast. & alii in
eand. leg.

(r) Paul. de Cast.
Consil. 66. vol. 1.
& Simo de Præ-
tis de Interpretat.
vol. 1. 2. dubi. 2.
Sol. 3.

in *Common Form*, it may be questioned at any time within thirty years next after, (s) by common Opinion before it work prescription, which is otherwise in case it be Proved in Form of Law, or *per Tester*. There is another kind or Form of Proving Testaments, which in the Civil Law is called *Apertura Testamenti*, but this favours too much of Ceremony to be of any use with us. Let it therefore suffice to be farther Noted, that be the Testament Proved in what manner soever, yet the Executor before the Office-Seal be affixed thereto, is to be obliged by his Oath, yea and by Bond if need so require, to render a just account of the Execution of the Testament when he shall be thereunto lawfully called. (t) Lastly, the Probate of every Bishops Testament, or the granting Administration of his Goods, although he had nor Goods but within his own Jurisdiction, does belong to the Arch-Bishop of the same Province. (u)

(s) Cowell. Interpret. verb. Probat.

(t) Stat. 6. & postquam de Test. l. 2. Provin. Const. Cant. (u) Coke Inst. Part. 4. verb. Prærog. Court. cap. 74.

5. Touching the Fees for Probate of Testaments, for Registering, Sealing, Writing, Preising, making of Inventories, giving Acquittances, Fines, and all other things concerning the same; as also for granting Administrations, the Reader is here referred to the Statute of 21 H. 8. cap. 5. Enacted in that behalf, where the penalty is Ten Pounds for taking more than is there appointed. If the Executor request any to engross the Testament, he must agree with him that he doth so request, (w) or bring one ready ingrossed with him, which for prevention of paying more Fees than is due by the Statute, is advised as a safe and ready way. Note, that by the said Statute, neither the money raised of Lands appointed by Will to be sold, nor the profits thereof, are to be accounted as any of the Testators Goods or Chattels. The Will is to be brought with Wax thereunto ready to be Sealed, and proof to be made thereof. And the Executor at the making of the Inventory is to call or take to him two of the Testators Creditors or Legatees, or in their absence or refusal two honest persons of the Testators next of Kin, or for default of them two other indifferent persons; which Inventory being indented is to be attested for the truth thereof by the Executors Oath, and one part thereof to be left with the Ordinary, the other part thereof to remain with the Executor.

Stat. 21 H. 8. c. 5.

(w) Coke Third.

6. If on Process or Summons from the Judge the Executors appear not to Prove the Will; they are punishable for contempt; if they appear, but refuse to Prove the Will, the Judge may grant Administration to the Widow or next of Kin. (x) Now *Refusal* cannot be by word only, but it must be Entered and Recorded in Court, and therefore it must be done before a Competent Judge, and not before Neighbours in the Countrey. But where an Executor hath once Administred, there he cannot afterwards refuse.

(x) Dist. Stat. 21 H. 8. c. 5. & 9 Ed. 4. c. 37. &c. Plowd. 184. a.

(y) 9 Ed. 4. 47.
Dyer in Cas.
Greisbrook &
Fox. Plow. Com.
280. b. Pasch.
7 Eliz.
(z) 16 H. 6.
fol. 78.

(a) Mich. 27,
28 Eliz.

(b) Offic. Exec.
cap. 3. §. 2.
An Executor be-
fore Probate of the
Will may release,
but not bring an
Action, *Harrison's*
Case, Cook. 5.
part. 28. vid.
Hugh's Abridg.
verb. Probate of
Wills and Testa-
ments,
(c) Ibid. vide
lib. 2. c.

fuse to Prove the Will and take on him the Executorship, because by once Administ'ring he hath accepted the Executorship by interpretation of Law, and so determined his Election; and in that Case the Ordinary ought not to accept of such refusal, but to compel him to Prove the Will, and take upon him the Executorship. (y) Yet in case the Judge doth admit one to refuse notwithstanding his former having Administred, it shall stand good. (z) But after refusal and Administration committed to another the Executor may not recede from it, and go back to Prove the Will, and to assume the Executorship; indeed if only upon the Executors making default of appearance upon Process or Summons to Prove the Will, Administration be *instante* committed to another, in this case the Executor may yet at any time after come in and Prove the Will, and so undo the Administration. (a) But if after refusal it appear to the Judge that the Executor had Administred before such refusal, he may revoke the Administration, and enforce the Executor to proceed to the Proving of the Will: As if A. being Executor shall Administer, and yet refuse to Prove the Will, so that Administration is committed to B; if B. being afterwards sued for Debt shall plead the matter *supra*, it shall be found a good Plea. (b) Also an Executor may be sued for the Debts of the Testator in some Cases even before the Will is Proved, for he may not by his own act of delaying to accept or refuse the Probate of the Will keep off Suits, except he will refuse in due manner, that so Administration being granted there may be some one suable by the Testators Creditors for the Debts owing by him. (c)

C H A P. XXI.

Of Proof requisite to a Will.

1. What Testimony sufficient to Prove a Will.
2. Proof requisite to a Will written by the Testators own hand.
3. What Witnesses are incompetent to Prove a Will.
4. Legataries how far they may be competent Witnesses.
5. Animus Testandi, how it may be proved.

1. **W**HERE there is no controversie or dispute touching the Will, there the single Oath of the Executor alone is sufficient for the Probate thereof in *Common Form*; and where other proof is requisite, there it lies much in the breast of the Judge duly regulated by Law what proof to admit for the number of Wit-
nesses,

nesses, for the quality of them, and for the nature of the Proof according to the circumstances and strength of opposition made against the Will. But regularly by the Laws and Customes of *England*, Two Witnesses without exception are requisite for the due Proof of a Testament, and Two such are sufficient; (a) So that it is not necessary to have any more than Two, (b) and it may be in vain to have no more but One; (c) for a Nuncupative Testament must be proved by at least Two Witnesses without exception. But

2. A Testament written by the Testators own hand Proves it self without the help of such Witnesses; yea, though it hath not his Name subscribed to it, nor his Seal affixed to it, nor witnesses present to it; Provided it be undoubtedly known to be his writing, or can be sufficiently proved so to be; yet shall it have the more Authority if so be it be subscribed by himself and Witnesses, and Sealed. Nor is it necessary to the Proof of a written Will that the Witnesses hear it read or subscribe it, so as they can depose that the Testator declared before them, that the self-same writing now produced, is, was, or should be his Last Will and Testament. For in a written Will or Testament it is not necessary that there be any Testimony of Witnesses where it is certain and undoubted that the Testament is written or subscribed with the Testators own hand; (d) or that the Testator caused the same to be written by another; but if these be doubtful, then the testimony of Witnesses is necessary. (e) Also the Witnesses ought to prove the very identity of the writing, that is, that the writing now shewed is the very same writing which the Testator in his life-time affirmed before them to be his Last Will, or to contain his Will, or other words full to this purpose; (f) so that it is not sufficient for the Witnesses to say, this is the Testators own hand, for or because we know his hand; (g) neither is it sufficient by comparing other writings of the Testators own hand with the Testament, (h) for hands may be counterfeited, therefore proof by similitude of hands is not full proof, (i) except where the style and practice of the Court runs otherwise. (k) Nevertheless if the Witnesses depose that they saw the Testator write or subscribe the Testament, and know the same to be his Testament and Hand; (l) or that they had heard the Testator to confess that he had made his Testament, and that the same was in such a mans Custody; (m) or if the Testament were found in the Testators Chest among other his writings, in these Cases the proof made by comparing of hands is a full and sufficient proof; (n) yea, though there appear not any of those helps by probable circumstances, yet if there be no suspicion of fraud, nor fear of subornation, proof made by comparing of hands may be allowed for

(a) Jus Civile, exigit septem. §. sed cum. & §. 6m. Inst. de Testam. Ordin.
(b) In c. Statut. verb. probatis, l. 3. Provin. Const.
(c) Jas. in l. Cunctos. C. de Summa Trinit.

(d) Auth. quod sine. C. de Test.
(e) Bart. in l. si ita scripta. ff. de Cond. & Demon.

(f) DD. in l. hac Consultat. & in Auth. in non observato. C. de Testam.

(g) Bart. & alii in l. si ita scripto. ff. de Cond. & demon.

(h) Richard. in ff. Auth. Quod sine.

(i) Bart. & alii in l. Admoneadi. ff. de iur. iurandi. (k) Vestr. Prac. lib. 6. c. 1.

(l) Richard. ubi supra.

(m) Bart. & alii in l. si ita scripto. ff. de Cond. & demon.

(n) Graf. Theol. Com. Op. §. Test. q. 16.

full and sufficient proof. Likewise if it be proved that the Testator in his life-time did acknowledge that his Testament was contained in a writing left in such a mans hands or custody, and that man produce a writing, deposing it to be the same which the Testator left in his custody; such proof is sufficient without any further comparing of hands. (e) But if the Testator did also acknowledge that his Testament contained in such a writing left in the custody of such a person, was written with his own hand, then such proof is not sufficient without comparing of hands, whereby it may appear to have been written by the Testator himself. (p)

(e) Alex. Conf.
167. vol. 5. nu. 1.

(p) Astruc in l.
heredes palam.
ff. de Testam. 2.

3. Regularly all persons are held competent Witnesses to prove a Controverted Will, save such as the Law holds incompetent; such are such as are parties interested, or presumed in Law to be byassed in affection, or the like; also infamous persons, as perjured, or the like; also such as for want of judgement and understanding the Law rejects. And if it cannot be proved whether it be a Testament or a Codicil, the circumstances being so indifferent to either, then is it most safe in regard of the Statute to commit the Administration to the Widow or next of Kin demanding the same, to avoid the forfeiture of Ten pounds, (q) in case the Judge before whom such penalty is demandable should adjudge the party to have died Intestate or without a Will.

(q) Stat. 28 H. 8.
c. 5.

4. A Legatary may be a competent witness for the proof of a Will in all parts thereof, saving for what concerns the Legacy therein bequeathed to himself. (r) So that suppose never so many Witnesses to a Will, wherein each of them hath a Legacy, they cannot sufficiently prove the Will as to their own Legacies, (s) but for the rest of the Will they may. (t)

(r) § Legatarius.
Inst. de Testa.
Ordin. & Portius
ibidem.

(s) Bart. in l.
omnibus. C. de
Testib.

(t) Albert. de
Testib. c. 4. nu. 57.

5. It is very observable, that the most considerable Requisite the Law aims at to the constituting of an Executor and making of a Testament, is to be proved more by Circumstances than by Witnesses; and that is *Animus Testandi*, or the intent or purpose of the Testator to make his Will. (u) For it is the mind, purpose and intent of the Testator more than his words that giveth life and being to the Testament. (w) The circumstances, that prove the intent or purpose, must also themselves be proved by Witnesses. These Circumstances proving such a purpose in the Testator are many; as when the Testator is in any more than ordinary danger of death; (x) or that he orderly composeth himself for such a work; (y) or that he required the Witnesses to bear witness thereof; (z) with many other the like circumstances, as to the person, time, place, occasion, manner of speech, deportment, and in whose presence. All which the circumspect Judge is to take into consideration; for since the mind and intention of the Testator is the essential qualification of every Testament, and not ca-

(u) Gloss. in l.
plane. Inst. de
Testa. Milit.

(w) Mant. de
Conject. ult. vol.
lib. 2. tit. 15. & l.
ex feud. ff. de
hered. Instit.

(x) Gloss. in l.
Divus. ff. de
Milit. Testam.

(y) Gloss. in dict.
l. plane.

(z) Gloss. in dict.
l. Divus.

pable of a Being otherwise than by such intention, and the mind and intention of man not so much as conjecturable otherwise than by outward circumstances, it is most necessary that they fall under a due proof by sufficient Witnesses.

C H A P. XXII.

Bona Notabilia.

1. *What shall be accounted as Bona Notabilia.*
2. *Where the Will is to be Proved in case there be Bona Notabilia.*
3. *How or when Debts and Bonds may make Bona Notabilia.*
4. *Law-Cases touching this Subject.*

1. **I**T is agreed by all, that Five Pounds is the sum or value of *Bona Notabilia*; provided that where by composition or custom in any County *Bona Notabilia* are rated at a greater sum, the same is to continue unaltered; as in the Diocels of London it is Ten Pounds by composition; (a) Provided also that if any man die *in itinere* or in a journey, the Goods that he hath then about him or with him shall not be as *Bona Notabilia* to cause Administration to be committed, or the Will to be Proved in the Prerogative. (b) Nor is it necessary that the party must have five pounds in each and every of the several Counties where his Goods are dispersed, but it is sufficient if the party deceased were possessed of Goods and Chattels in some other County than that wherein he lived and died to the full value of five pounds besides those Goods extant in the County where he died. So that although the deceased's Goods and Chattels do amount to Ten Pounds or more, yet if the Goods and Chattels extant in some other County do not extend to Five Pounds at the least, the deceased is not to be accounted to have *Bona Notabilia*.

(a) Coke part.
4. Instit. cap. 74.
verb. Prerogati.
Court.

(b) Offic. Exec.
c. 4. §. 2.

2. Regularly the Will is, as hath been said, to be Proved in the Ecclesiastical Court of the same County where the Testator is an Inhabitant, or wherein he made his most usual residence and abode for the latter years before his death, and not in the Ecclesiastical Court of that County wherein he made his Will, or wherein he died, but where his last place of habitation was; but if the Testator died possessed of Goods to the value of Five Pounds, called *Bona Notabilia*, in divers Counties, then the Will is to be Proved in the Prerogative Court, to which also Appeals from any other inferior Jurisdiction: So that the Prerogative Court of the Arch-

Bishop of *Canterbury* is the Court wherein all Testaments are to be Proved, and all Administrations to be granted, where the party dying within his Province hath *Bona Notabilia* in some other Diocess than that wherein he died, which regularly is to be to the value of Five Pounds, save where by custome or composition it is at any greater sum, as aforesaid. Also if any Testator die not possessed as aforesaid, and the Executor notwithstanding Prove the Will in the Prerogative, such Probate shall stand good: But it is otherwise if the Will be Proved in the Inferiour Jurisdiction when the Testator dies possessed, as aforesaid, of *Bona Notabilia*; for in such case it is again to be Proved in the Prerogative. And if a man hath Goods in divers Diocesses or Provinces, and make his Executor of his Goods in one of the Provinces, and die Intestate as to his other Goods: And if the Ordinary do commit Administration of the Goods which are in the other Province unto the said Executor, then is he both Executor and Administrator, and the party died both Testate and Intestate. (c) And if a man died Intestate having *Bona Notabilia* in divers Diocesses, the Judge used to Assess a convenient sum to be employed *in pios usus*, but with and under certain limitations, (d) or legal restrictions.

(c) 35 H. 6. 36.

(d) Coke ubi supra.

3. Debts owing to the Testator are held *Bona Notabilia* as well as Goods in possession, their value being answerable; yet if the penal sum of a Bond be but Five Pounds for the payment of a less sum, although the Bond be forfeited, yet that is not understood as *Bona Notabilia*, although in Law the whole penal sum be a Duty. (e) And those Debts are said to be *Bona Notabilia*, where the Bonds or other Specialties are, and not where the Debtors inhabit; so that if the Bonds be in the County where the Testator died, and the Debtors in another County, in this case the Will is not to be Proved in the Prerogative Court; but in case the Debts are only by Contract without Specialty, they are then to be esteemed *Bona Notabilia* there and in that place where the Debtor is. But in case Lands be by Will given to be Sold for payment of Debts and Legacies, this is not to be accounted as *Bona Notabilia*, though it be Assets; (f) for where Land is bequeathed to be sold for such uses, there neither the money raised thereby, nor the profits thereof shall be accounted as any of the Testators Goods or Chattels.

(e) Ibid.

(e) Offic. Exec. ubi supra.

4. One had Goods solely in an Inferiour Diocess; and the Metropolitan of the Province pretending that he had *Bona Notabilia* in divers Diocesses, committed the Administration of the Goods. It was resolved, that such Administration granted by the Metropolitan, was not void, but voidable by Sentence, because the Metropolitan hath Jurisdiction of all places within his Province. But if the Ordinary of one Diocess committeth Administration of Goods,

Goods when the party hath *Bona Notabilia* in divers Diocesses, the Administration is void as well for his Goods within the Diocess, as without. (g)

In an Action of Debt brought by an Administratrix upon an Administration brought by the Bishop of R. the Defendant pleaded an Administration committed to him by the Dean and Chapter of *Canterbury sede vacante*, because the Intestate had *Bona Notabilia*. The Plaintiff Replyed, that the said Administration was Repealed; and it was adjudged for the Plaintiff: 1. Because the Defendant did not shew what *Bona Notabilia* the Intestate had in certain; and it shall be intended he had not *Bona Notabilia*, and such Administration is but voidable. 2. Because before the Repeal of the Administration committed by the Metropolitan, the Inferiour Ordinary may commit Administration; and when the Defendants Administration is Repealed, it is void *ab initio*; and in the Principal Case, it was also resolved, that whereas the Administration was committed to the Obligor, that the Debt was not extinct, because it is in another right: otherwise it is, if the Obligee himself made the Obligor his Executor. (h)

In Debt brought upon an Obligation, the Case was, the Intestate died in *Lancashire*: The Obligation upon which the Action was brought was in *London* at the time of his death. The Bishop of *Chester* in whose Diocess the Intestate died, grants Administration to J. S. who released to the Defendant: The Arch-Bishop of *Canterbury* granted Letters of Administration to the Plaintiff, and in Debt brought by him the Release was pleaded in Bar. In this Case, it was holden by the Justices, where one dieth who hath Goods in divers Diocesses, *Canterbury* shall have the Prerogative; and it was holden, that if *Canterbury* hath not any Prerogative in *York*, yet that this Bond ought to be Sued in and committed Administration of, within the Court of *Canterbury*, and committed by the Bishop of that Diocess. (i)

If a man dies Intestate, having Goods in divers Counties, the Metropolitan shall grant the Administration; 14 H. 6. 21. 10 H. 7. 18. 35 H. 6. 43. If he hath *Bona Notabilia* to the value of one hundred shillings in divers Diocesses, the Metropolitan shall grant the Administration; 10 H. 7. 16. b. Or if a man dies beyond the Seas Intestate, the Arch-Bishop shall grant the Administration; P. 11 Jac. B. per Co. to be adjudged in 42 Eliz.

If a man dies Intestate having *Bona Notabilia* in *England* and *Ireland* several Administrations shall be granted, viz. by the Arch-Bishop of *Canterbury* for the Goods in his Province, and by the Arch-Bishop of *Dublin* for the Goods in his.

It is Ordained by a Canon, i Jac. cap. 92. That if a man dies in a Journey, the Goods which he had at that time with him, shall

not:

(g) 22 Eliz. 1n
C. B. Vere and
Jefferys Case.
Co. 5. part. 29.

(h) 8 Jac. Cooc.
8. part. Sir John
Needhams Case.
fol. 135.

(i) Hill. 38 Eliz.
C. B. Byren and
Byrons Case. Cro.
2 part. 472. and
Hugb's Abridg.
vol. 3. tit. Admini-
strator.

Roller Abridgm.
tit. Execut. lit. F.

Dyer. 14 Eliz.
305. Roll. 2. id. Co.

not cause his Testament or Administration to be liable to the Prerogative Court.

*Roller Abridg.
tit. Execut. lit. H.*

If a man hath Goods to the value of Five Pound in one Diocess, and a Lease for years of the same value in another Diocess, they are *Bona Notabilia*, whereby the Arch-Bishop shall grant the Administration, although the Lease for years be not a thing moveable, nor properly *Bonum*, but it is a Chattel according to Pleadings.

*Trin. 14 Car.
inter Lunn &
Dedson, per Cu-
riam. Roll. ibid.
lit. G.*

If a man becomes bound in an Obligation at London, and dies Intestate in Devon, and there hath the Obligation at the time of his death with him, Administration ought to be granted by the Bishop of Exon, where the Obligation was at the time of his death, and not by the Bishop of London where the Obligation was made; for the Debt shall be accounted Goods, as to the granting of Letters of Administration, where the Bond was at his death, and not where it was made.

*Hill. 27 Eliz. B.
& Trin. 17 Jac.
inter Trembridge
and Taylor, per
Cur. Roll. ibid.*

To make *Bona Notabilia*, a Debt without specialty shall be accounted Goods where the Debtor lives, and not where the Testator lived. Likewise if a man dies Intestate, having divers Debts or Obligations in several Diocesses, the Debts are said to be *Bona Notabilia* where the Bonds or Obligations are, and not where the Debtors or Debtors are.

*Dyer. 14 Eliz.
305. 58.*

If a man hath Goods to the value of Five Pound in one Diocess, and a Bond or Obligation to a greater value in another Diocess, the Obligation being there also made, they are *Bona Notabilia*, for which reason the Arch-Bishop shall grant Administration.

*Perkins. 6. 489.
Roll. ibid. lit. I.*

Anciently if a man died Intestate, having Goods to the value of Forty Shillings in two Diocesses, it should make the Goods to be *Bona Notabilia*, whereby Administration should be granted by the Arch-Bishop. But by a *Canon 1 Jac. cap. 93*. It is Ordained, that *Bona Notabilia* shall be accounted to be Five Pound at least, and that none shall be said to have *Bona Notabilia* unless he hath Goods in divers Diocesses to the value of Five Pound, and so that *Canon* hath changed the Law, if it were otherwise before. Likewise in the said *Canon* there is an Exception of such Diocesses where by Custome or Composition *Bona Notabilia* are rated at a greater sum than Five Pound.

The Chapters of the Second PART.

- I. *Of the Appointing or Constituting Executors.*
- II. *Of Conditional Executors.*
- III. *Of appointing Co-executors.*
- IV. *Of substitutions and appointing Executors by degrees.*
- V. *Of the several ways of Constituting Executors.*
- VI. *Of persons incapable of being Executors or Administrators.*
- VII. *Of an-Executors Executor.*
- VIII. *Of an Executor in his own wrong.*
- IX. *Of a Child in the Womb made Executor, and of an Infant Executor; as also of Executors and Administrators durante Minoritate.*
- X. *Of a woman under Coverture made Executrix, or making Executors.*
- XI. *Of Debtors and Creditors made Executors.*
- XII. *Of the general difference between an Executor and an Administrator; and wherein they generally agree.*
- XIII. *Of the Executors Rights exclusively to the Heirs.*
- XIV. *Of the Heirs Rights exclusively to the Executors.*
- XV. *What goes neither to the Heir nor Executor, and in what Cases.*
- XVI. *Of the Indivisibility of the right and interest of Co-Executors.*
- XVII. *Of the Executors Interest and Possession; and how it differs from that which he hath in his own proper Goods.*
- XVIII. *Of the Executors Right in opposition to the Heirs in reference to Mortgages.*
- XIX. *Touching the Executors Election to accept or refuse the Executorship.*
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- XXI. *Of Inventories.*
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- XXIV. *Of Assets charging Executors, or not.*
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 XXXIV. *Of Succession in the Right Line Descendent.*
 XXXV. *Of Succession in the Right Line Ascendent.*
 XXXVI. *Of Succession in the Line Transversal or Collateral.*
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THE



THE SECOND PART. OF Executors and Administrators.

CHAP. I. Of the Appointing or Constituting Executors.

1. The Testators freedom or Liberty in making Executors.
2. How the Office of Executorship may be perform'd or discharg'd, when a King is made Executor.

1. **T**He word *Executor* taken in the largest sence falls under a three-fold acceptation; for so there is *Executor à Lege constitutus*, and that is the ordinary of the Diocess; and there is *Executor à Testatore constitutus*, and that is the *Executor Testamentarius*; and there is *Executor ab Episcopo constitutus*, and that is the *Executor Datus*, who is called an *Administrator* to an *Intestate*. By the Civil Law this *Executor Testamentarius*, or *Haeris* in the Dialèct of that Law, doth succeed in *Universum jus defuncti*. (a) Now the Law holds forth that Liberty to Testators that they may if they please exclude their own Wives and Children, and appoint strangers in their Testaments to be their Executors; (b) for the validity of the Testators Will chiefly consists in the freedom and liberty of the Will of the Testator. Therefore the Testator may if he please appoint even Bondmen, Villains, or Prisoners as his Executors, (c) or Infants, (d) yea whether born or not born at the time of the Testators death; (e) or Women, whether under Covert and Married, or Sole. (f) Also Testators may if they please make such persons their Executors as are either their Debtors or their Creditors, (g) or one single person, or many joyntly as Co-Executors in several persons, (h) or many joyntly representing

(a) L. 1. Cod. de Heredib.

(b) Bract. de Consuetud. & Lep. Angl. lib. 3. cap. 26. & Tract. de Reb. Angl. lib. 3. cap. 7.

(c) Inst. de Hered. inst.

(d) Bract. Abrid. tit. Execut. m. 115.

(e) Jo. de Can. Tract. de Exec. ult. vol. partic. 1. m. 44.

(f) Fitzh. & Bro. tit. Exec.

(g) L. Simus. §. in computatione.

C. de jure delib. (h) §. unum. Inst. de har.

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(i) 1. hered. C. de hered. Inst. & Mising. in dist. §. unum. & Graf. Thef. Com. Op. §. Inst. q. 40.

(k) Glofs. in l. is cui. ff. de Test.

(l) Rot. Par. 15 H. 6. n. 37.

(m) Coke Inst. part. 4. verb. Prærogat.

one Body, as a Colledge, City, or other Corporation. (i) So likewise they may make their Executors simply and absolutely, or conditionally; also from a certain time, or to a certain time; also either universally, or specially and particularly; likewise in the first, second, third, &c. degree by the substitution of one Executor in the place of another. And here note, that after how many ways an Executor may be appointed, after so many and the same ways may a Legacy be given; and whosoever is capable of an Executorship, is also capable of a Legacy. (k) *Et c. Contra.*

2. When the King is made Executor, he doth appoint certain persons to Officiate the Execution of the Will; against whom such as have cause of Action may bring their Suits; and appointeth others to take the account. (l) So *Katherine Queen Dowager of England* Mother of *Henry the sixth*, who died 2 June, 1436. made her Will, and thereof *Henry the sixth* her sole Executor; whereupon the King appointed *Robert Rolleston*, Keeper of the Wardrobe and others to Execute the said Will, by the oversight of the Cardinal, the Duke of *Glocester*, and the Bishop of *Lincoln* or any Two of them, unto whom they were to account. (m)

CHAP. II.

Of Conditional Executors.

1. Executors may be appointed simply or conditionally.
2. Executors may be limited in point of time.
3. A threefold qualification of an Executors Power.

1. Testaments wherein the Executor is pure and simply made, are such as wherein the Testator maketh his Executor without any condition at all; but when the assignation or nomination of the Executor hath some such quality added to it or joyned with it, as whereby the effect of the disposition is suspended and depends upon some future event, then is such assignation said to be Conditional. (a) Also the condition in creating or appointing an Executor may be either precedent or subsequent; (b) yea and sometimes it may be conditionally that he give security to pay the Legacies, and, in general, to perform the Will before he Act as Executor. The conditions incident to the appointing of Executors are very numerous and uncertain according to the pleasure of the Testator, so as they be neither necessary, nor impossible, nor unlawful, nor capitious Conditions.

2. The time may be limited when the Executorship shall begin,

(a) Richard. in Rub. de Inst. & Subst. C. nu. 1. & Graf. Thef. Com. Op. §. legatum. §. 46.

(b) H. 6. fol. 6.

gin, and that either certainly or with reference to Contingency; (c) for by the Laws of the Land it is lawfull for a Testator to appoint his Executor either from a certain time, or until a certain time; and in the mean time Administration may be committed to the next of Kin, or to the Widow; and the Acts then done by such Administrator cannot be voided by the Executor afterwards; (d) and in this sence the same person may be said to die partly Testate and partly Intestate, which by the strictness of the Civil Law is not allowable. (e)

3. As the Conditions incident to the making of Executors and giving of Legacies, are (as aforesaid) very many and full of variety; so also the power it self of Executors may be limited, qualified, and divided, specially these Three wayes, viz. First, *Really*: as thus; he may make A. his Executor for his Plate and Householdstuff; B. his Executor for his Sheep and Cattel; C. his Executor for his Leases and States by extent; and D. his Executor for the Debts due to him. Secondly, *Locally*: as thus, viz. he may make E. his Executor for his Goods in *Cornwall*; F. his Executor for his Goods in *Devon*; and G. his Executor for his Goods in *Somerset*. Thirdly, *Temporally*: as thus; he may make his Wife his Executrix during her Widow-hood, or during his Sons minority. (f)

(c) Plowd. in Cal. inter Grotk. & Fow. 2: H. 8. & Brook. m. 155. tit. Execut. & tit. Administ. m. 45.

(d) Plowd. in dict. Cal.

(e) Dec. Cagnol. & Hier. Francan l. jus nostrum. & de Reg. Jur.

(f) 19 H. 8. 2. & 16 H. 8. Dyer. 4. Hill. 33 Eliz. in Com. B. & 32 H. 8. Broc. 115.

CHAP. III.

Of appointing Co-Executors.

1. How one alone or many jointly may be made Executors.
2. How Executors may be made universally or particularly.

1. **O**ne person alone, or divers together, so the number be not too numerous, may be appointed Executors. (a) And where divers persons be made Executors, all are to be admitted, and not one without the rest, (b) unless they cannot or will not undertake the Executorship. (c) Which conclusion holds true, though he be a stranger who is joyned in the Executorship with the Testators own Son; it is true also whether the Executorship be appointed alternatively or disjunctively; in which case if the Testator say, I make A. B. or C. D. my Executors, both persons are Admissable; (d) For this word [or] in favour of Testaments is taken for [and] (e) unless it be most evident that the Testator did bear much more affection to the one than to the other, (f) or unless the Authority of Election of the person be by the Testa-

(a) §. Et unum. Instit. de hered. Instit.

(b) l. religiosi. §. Sancti. de Test. lib. 6.

(c) Supra. Par. i. c. 20. §. 6.

(d) l. quidam. C. de verb. sign. & Mant. de Con. ult. vol. l. 4. c. 3. n. 19.

(e) dict. l. quid. C. ibid.

(f) Ripa. in C. inter ceteros. De Rescript. Extr. m. 34.

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(g) l. Si Titio aut
Scip. ff. de Leg.
(h) Jaf. in l. cu
quid. C. de ver.
tig. limit. 5. &
Broo. *Ab idem*.
tit. Execut. n. 117.

(i) l. 3. C. de
mil. testa.
(k) l. hered. ff.
de Reg. jur. &
ibi Cogn. &
Plowd. in Cas. in
ter Greib. & Fox.
(l) *Tom of law*.
verb. Exec.
(m) Fitzh. Abr.
tit. Exec. n. 26.
Broo. cod. tit. n.
2. & 155.
(n) Fitzh. & Br.
ubi supra. & l. si
hered. de Eleg. l.

(o) Fitzh. & Br.
ibid.

tor granted unto another, (g) or unless one of the persons be incapable of the Executorship. (h) And here note, that where there be divers Executors, the Action commenced by them or against them, ought to be commenced in all their names; and not in the name of some of them only without the rest.

2. Likewise an Executor may be appointed either universally or particularly. *Universally*, when he is made Executor of the whole Will, or of all the Testators Goods, or indefinitely; (i) and such Executor may enter into all the Testators Goods; (k) in which respect he is universally chargeable with the payment of all his Debts and Legacies, so far as the same Goods extend. (l) Also an Executor may be appointed *Particularly*, that is, of some part of the Will, or only of some part of the Testators Goods; (m) in which respect such Executor may meddle with no more than is allotted to him, and so not chargeable but according to his portion. (n) And if there be no other Executor appointed, such particular Executor cannot meddle with the residue of the Goods; for of them the Testator by the Laws of this Land is said to die Intestate. (o) And thus in this case also may the same person die both Testate and Intestate, not only in respect of time, as aforesaid, but also in respect of place and Goods, contrary (as was before declared) to the strictness of the Civil Law. In the same sense also one may be made universal or particular Legatary. And where the Testator leaves all his Goods or the residue of them to some person, none else being appointed Executor, that person in Law seems to be appointed Executor thereof, at least admissible to the Administration.

C H A P. IV.

Of Substitutions and appointing Executors by degrees.

THE Testator is then said to make degrees of Executors when he doth substitute one in place of another; (a) For an Executor may be made either in the first, second, third, fourth or fifth degree, &c. (b) And he that is made Executor in the first degree is said to be instituted, the rest are said to be substituted: (c) As thus; The Testator maketh A. his Executor, but if he will not or cannot be his Executor, then he maketh B. his Executor, and if B. cannot or will not be his Executor, then he maketh C. his Executor; and so on. In which example, there be Three degrees of Executors; A. is said to be instituted Executor in the first degree; B. is said to be substituted Executor in the second degree; and C.

(a) l. potest quis
ff. de vulg. Subst.
& Inst. de vulg.
Subst. in prin. &
Franc. post Glos.
in cap. ult. de
Testa. 6. & Broo.
tit. Exec. nu. 9.
(b) Ibid.
(c) Jaf. in Tract.
de subst. in prin.

is said to be substituted in the third degree. And so it is lawful for a Testator to make as many degrees of Executors as he pleases; (d) and in the place of one only Executor he may if he please substitute more than one. (e) Also it is lawful for the Testator to institute an Executor simply, and to substitute another in his place conditionally; (f) or to institute one conditionally, and to substitute another simply. (g) And so long as he that is appointed Executor in the first degree may be Executor, he in the second degree may not be admitted. (h) Likewise by the second degree the third is repelled, and by the third the fourth, &c. Also if but any one of the Executors in the first degree may be admitted, the Substitute is excluded, unless the Testator doth appoint to every Executor first instituted his several Substitute respectively. (i) Also the Substitute ought to succeed in that part or quantity of the Testators Goods which was assigned to the former Executor. (k)

(d) di. l. potest quis. ff. de Vulg. Subst. & Inst. eod. tit. in prin.
(e) §. plures. Inst. ibid.
(f) l. qui Liberris. ff. de Vulg. Subst.
(g) l. sub Conditione. ff. de hered. instir.
(h) l. quando. ff. de Acq. hered. & l. cum in testa. ff. de hered. instir. & l. post ad C. de Impub.
(i) l. quidam. C. de Impub.
(k) l. r. c. eod.

CHAP. V.

Of the several ways of Constituting Executors.

1. *The bare nomination of an Executor is the Creation of a Will.*
2. *Words implying an Executor equivalent to the word Executor.*
3. *Instances of an Executorship without naming the word [Executor.]*
4. *Small Errors in a Will no prejudice to the Will.*

1. **T**HE bare naming of an Executor, in the name of a Will, without giving any Legacy, or appointing any thing to be done by an Executor, is sufficient to make it a Will, and as a Will it is to be Proved: (a) for the naming of Executors is by Implication a gift or Donation to them of all the Goods, Chattels, Credits, and personal estate of the Testator, and the laying upon them an obligation of satisfying the Testators debts to the just value of the said Goods and Chattels.

(a) Offici. Execut. c. 1. §. 1.

2. Although no Executor by the word [Executor] be expressly in the Will nominated or appointed, yet if any other words or circumlocutions equivalent to the Function of an Executor, or to the charge and office which in any part pertains to an Executor, be recommended or committed to any one or more, it shall amount to as much as the Ordaining or Constituting of him or them Executors by the very word Executor. (b) For the Law in the interpretation of Wills and Testaments regardeth not so much the words as the meaning of the Testator. (c) Besides, it is not always

(b) Cum tibi de Testa. Extr. sum. Rosell. verb. testa. §. 1. vers. quibus verbis.
(c) l. quoniam. Mant. de Conject. ult. vol. l. 3.

(d) Broo. tit.
Execut. nu. 98.
(e) Panor. in C.
Ranufus. nu. 3
(f) in dict. l.
quoniam. C. de
Testa. & Mant.
supra.

(g) 39 H. 6.
Dyer. 290.

(h) M. 15. & 16
Eliz. 31 H. 6. 6, 7.
& 39 H. 6. Dyer.
290.

(i) dict. cum tibi.
De Testa. extra.
& Sum. Rosell.
ubi supra.
(k) Abridg. dez
Cafes. fol. 175.
nu. 1.
(l) Broo. Abridg.
tit. Exec. nu. 98.
(m) l. his ver. ff.
de her. inst.
(n) Glof. Bart. &
Bald. in dict. l.
his verbis.
(o) Mant. ubi fu-
pra. nu. 8.
(p) Panor. in
dict. c. Ramu. de
Test. extra. nu. 3.
(q) Jul. Cla. §.
test. l. 35. nu. 2.

(r) Richard. in
Rub. de her. inst.
C. nu. 3.
(s) Ripa. Alceat.
Zafius. & alii
DD. in l. 4. §. si
quis ita. ff. de
verbor. Oblig. &
Jul. Cla. §. Test.
q. 37.

alwayes necessary to exprefs the word [Executor] in the making of an Executor; (d) nor indeed hath every Testator skill enough so to do, or to think it necessary. (e) Wherefore it is sufficient if the Testators meaning doth appear by other words of the like sence. (f) Hence then it is evident that such words as do imply the office of an Executor are as valid as the word [Executor] it self; so that if the Testator declare by his Will that *A. B.* shall have his Goods after his death, to pay his debts, or otherwise to dispose thereof at his pleasure, or to that effect, he shall be his Executor. (g) Inſomuch that he that doth commit all his Goods to the disposition of another, doth not die Intestate; yea, if only Administration be (by that word) in a Will granted to one, Executorship doth thereby pass. (h) And unto whom the Testator doth leave the residue of his Goods (none else as aforesaid being appointed Executor) to him the whole Executorship doth pass by that general Legacy, at least the Administration as aforesaid is to be granted to such a general Legatary; the reason being, because the ignorant and vulgar sort know not for the most part how better to exprefs their meaning of an Executor, or the function thereof.

3. If the Testator saith, I commit all my Goods to the Administration, or to the disposition of *A. B.* in this case he is made Executor, it being in effect as if he had said, I make him my Executor: (i) Or if he saith, I will that *A. B.* shall dispose of my Goods which be in his custody, he is thereby made Executor of those parcells of Goods; (k) or if the Testator saith, I commit all my Goods to the hands and disposition of *A. B.* In this Case also he is made Executor of all his Goods. (l) So also if he saith I make *A. B.* Lord of all my Goods: (m) or, I leave all my Goods to *A. B.* (n) or thus, I make *A. B.* Legatary of all my Goods: (o) or I leave the residue of all my Goods to *A. B.* (p) or if the Testator saith, I will that *A. B.* be my Executor, if *C. D.* will not; in this Case *C. D.* is appointed to be Executor, and may if he please be admitted to the Executorship, and exclude *A. B.* (q) Or if the Testator supposing his Child, his Brother, or his Kinsman to be dead, doth say in his Will, viz. Forasmuch as my Child, my Brother, &c. is dead, I make *A. B.* my Executor: In this Case, if the person whom the Testator thought dead be alive, he shall be Executor. (r) Or if the Testator being demanded by another whether he doth make *A. B.* his Executor, doth answer, Yea, I do, or, What else, or, Why not, or, Whom else should I make Executor, or, I cannot deny it, or other words to that purpose *cum animo Testandi*; this shall be a pure and simple assignation of *A. B.* to be Executor. (s) Also if the Testator doth make *A. B.* or *C. D.* his Executors; in this Case both of them shall be

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his Executors; because (as aforesaid) or] is here taken for [and] Provided always in all the Cases aforesaid, and in every other the like Case, that the Testator have a firm and constant purpose and meaning to make his Will whensoever he uttereth any such words.

(*r*) And as it matters not by what significant words the Executor is appointed: So it is not material in what part of the Will or Testament he is appointed, as whether in the beginning, or in the midst, or in the end thereof: (*s*) So as that he be therein expressed or sufficiently implied as aforesaid.

4. False English, or words mis-spelt in a Will, or other common mistakes shall not prejudice the Will or disposition or Executorship, if it may evidently appear what or whom the Testator meant, and that at the same time he was not *non sana memoria*; yea, though the Will want the words of conclusion, viz. *In witness whereof, &c.* It is good in case it may otherwise appear to be the Testators Last Will and Testament.

(*r*) Mantie. de Coniect. ult. vol. lib. 4. tit. 4. in prin.

(*s*) §. ante. Inst. de Legat. & Graf. Thef. Com. Op. Inst. q. 1.

C H A P. VI.

Of persons incapable of being Executors or Administrators.

A Postates, (*a*) Traytors, Felons, (*b*) persons Out-lawed, (*c*) Incestuous Bastards, (*d*) Famous Libellers, (*e*) manifest Usurers, (*f*) Sodomites, (*g*) uncertain persons, (*h*) and Recusants Convict, (*i*) are all excluded from being Executors; yet each of these hath his respective qualifications. (*k*) And all these are incapable both of Executorship and Legacies, if they be such either at the time of making the Testament, or at the time of the Testators death, or when they assume the Executorship. (*l*) Yet Incestuous and Adulterous Bastards are incapable of being Executors only to, or receiving Legacies only from their own Natural Parents, necessary means of sustentation only excepted. (*m*) But as to other Legataries it is sufficient if they are capable only at the time of the Testators death. (*n*) And the foresaid Rule relating to Incestuous Illegitimates is attended with more ampliations and restrictions in the Law than to insert here is adequate to the design of this summary Collection. Add to these persons Excommunicated, who so long as they lie under the sentence of Excommunication are not to be admitted either to Executorship or to Legacie; (*o*) nor during such time can such commence any suit for Legacies; they cannot sue, that is, proceed in suit as Executors till they be absolved; for this works not a nullity of the Executorship, nor overthrows the suit, but stays it only from proceeding.

(*a*) l. hi qui. C. de Apost.

(*b*) l. qui ultimo. ff. de Fornis.

(*c*) Fitz. Abridg. tit. Adm. n. 3.

(*d*) C. de Incest. Nupt.

(*e*) l. si cui. §. ult. ff. de Testa.

(*f*) Gloss. ibid.

(*g*) Ibidem.

(*h*) §. incertis. Inst. de Legib.

(*i*) 1 Jac. cap. 52.

(*k*) Sap. lib. 1. cap. 7. §. 9.

(*l*) l. si alienum. §. r. ff. de hered. instit.

(*m*) Gloss. in Auth. quib. mod. Na. eff. sui. §. fin. & Jul. Cla. §. Test. q. 32. nu. 4.

(*n*) l. non potest. ff. de leg.

(*o*) cap. intelleximus. de Jus. & C. post cessionem. de Prob. bat. Extr.

ing,

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(p) *Offic. Exec.*
cap. 1. §. 4.

(q) *Croke Rep.*
in *Sir Upwells*
Carsons Case.

(r) *Croke Rep.* ib.

(s) *Fitzh. tit. Ex-*
ecut. nu. 11. 58.
Non-ability.
18 *Broo. Non-*
ability. nu. 38.
(t) *Offic. Exec.*
c. 18. & alii.

ing untill absolution be had and obtained: (p) Yet a person Out-lawed (as is reported) also a person attainted may be an Executor: (q) where it is also said, that an Alien may be Administrator, and have Administration of Leases as well as of personal things, because he hath them as an Executor in anothers right, and not to his own use. (r) Yea, it is also said, that a Bastard, an Excommunicate, or an Out-lawed person may be as able and as absolute an Executor as any other. (s) Also Infants may be made Executors; but the performance of that Office shall not be committed to them untill they have attained unto the Age of seventeen years. (t) To the first forementioned may be added Corporations, which, although lawful ones, yet may not stand Executors, unless they can duely Prove the Will, and take an Executors Oath. Finally note, that what hath been here formerly said of Executors, may be also applied to, and understood of Administrators.

CHAP. VII.

Of an Executors Executor.

1. *That the Executor of a sole Executor is Executor to the first Testator.*

2. *That an Executors Executor cannot perform a Trust committed by the first Testator.*

3. *An Executors Executor hath nothing to do with the first Testators Goods, where there is a surviving joyn-Executor.*

4. *In what Case an Executors Executor shall have to do with the first Testators Goods, when the surviving joyn-Executor shall not meddle therewith.*

1. **AN** Executors Executor, where there is no joyn-Executor, is Executor to the first Testator as he is to the second; and consequently hath a right to all the profit, and is liable to all the charge that the first Executor had or was subject unto; yet with this caution and difference, that the one Testators Goods shall not stand charged for the other Testators debts, but each for his own respectively. (a) And if in such case the Executors Executor assume the Administration of the first Testators Goods, he cannot afterwards refuse the Administration of the Goods of the later Testator; but he may accept the later, yet refuse the former; but not *è contra*. (b) Also an Executors Executor shall not be admitted to Administer the Goods of the first Testator where the first Executor (who was his Testator) refused to Administer, or died before

(s) *Stat. 25 E. 3.*
can. 4. & *Coke* 5.
9 & *Plow.* 86. &
54 *H. 6.* 14.

(t) *Trin. 17 Jac.*
Con. B. Wolf and
Heydens Case.

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fore Probate, (c) unless all the residue of the first Testators Goods, after the debts paid, be given in the Will to the first Executor. (d)

(c) Dyer 372.

(d) Adjudged in Hill. 9. Chas. in Dens Case & Brownl. 1. par. 90.

2. Where a special trust is by Will recommended to an Executor, as to sell Lands, &c. This being not performed in his lifetime, shall not be performable by his Executor after his death. (e) Contrariwise it is of an interest, as to take the profits of Lands for certain years towards payment of Debts and Legacies, or for recovery of Rents of Inheritance left unpaid in the Testators lifetime.

(e) Offic. Exec. cap. 20.

3. If Two Executors be appointed, whereof one maketh his Testament, wherein he nameth his Executor and dieth, his joynt-Executor surviving; in this Case the Executor of the Executor is not to be joyned with the said joynt-Executor surviving, neither in the Execution of the Will, nor in Suits or Actions. (f) And if such Executor of the Executor have any Goods which did belong to the first Testator, the surviving Executor of the same first Testator may have an Action against such Executors Executor for the same. (g) Inasmuch, that if the surviving Executor doth afterward die intestate, yet may not the Executors Executor meddle with the Goods of the former Testator; for the power of the Executor who died first was determined by his death; the other then surviving; (h) And the Judge in this Case may commit the Administration both of the surviving Executor who died afterwards intestate, and of the Goods of the former Testator not before Administred. And if the Executor of the Executor who died first, meddle with the Goods of the first Testator, he may be sued by the Creditors of the first Testator, as Executor in his own wrong: (i) But where there is no joynt-Executor, there most things which concern immediate Executors, extend also to the mediate or more remote Executors; that the mediate Executor in the fourth, fifth, or further degree stands in like manner Executor to the first Testator, as the first and immediate Executor, and may sue or be sued as the former. (k)

(f) Brook. Abrid. tit. Execut. nu. 92. 160.

(g) Ibid. nu. 99.

(h) Ibid. nu. 149.

(i) Ibid. nu. 29. & 99.

(k) Offic. Exec. cap. 20.

4. Suppose Two Executors, whereof One refuses to Prove the Will and Administer; the other Proves it, Administers and dies Testate; In this Case the Executor of that joynt-Executor that so Proved the Will, shall be the first Testators Executor, and the surviving Executor so formerly refusing shall not now be admitted to intermeddle therewith, because his Election determined at his Co-Executors death. (l) But it is otherwise where the surviving Executor hath accepted the Executorship, for in that Case he shall have the sole disposing of the Estate, and the Co-Executors Executor is not to intermeddle therewith, but to surrender to the other what Goods belonging to the first Testator happen to be in his Custody.

(l) Dyer 160.

Hill. 22 Eliz.
B. R. Limbor,
vers. Every, Crow
par. 3.

Error, the Error assign'd was, That *W. E.* had brought debt upon an Obligation by the name of *W. E. Administ. Bonorum & Catallorum A. E. durante minori etate of J. E.* Executor of the said *A. E.* Executor of *R. E.* and demands a Debt upon an Obligation of Twenty nine pound made to the said *R. E.* the first Testator, whereas he could not bring an Action by this Name, but as Administrator of *R. E.* But it was said, that Administration of the Goods of *R. E.* being committed to him by this name, *omnium Bonorum, &c. A. E.* it may well be committed to him by this Name; especially when *A. E.* did not die Intestate, but made an Executor; 10 Ed. 4. 1. That by the grant of the Administration of the Goods of the Executor, Administration is by it granted of all the Goods of the first Testator; 27 H. 8. 7. *Curia, Contra* clearly. For by this Administration committed, he hath no Authority to meddle with the Goods of the first Testator; and for this cause the Judgement was reversed.

Pasth. 3 Eliz.
Moo. Rep. m. 8.

Debt against the Executor of an Executor. The Defendant pleaded, that the Executors Testator had fully Administred, and that he had nothing in his hands at the time of his death; and it was found that he had Assets. Whereupon a *Fieri facias* issued to the Sheriff, and he returned, that the Defendant had nothing. And it was held, that the Sheriff should be amerced, for he should have stopt making such Return: And that it should be no prejudice to the Plaintiff, for that the Debt shall be charged so long as the Record remains in force not Reversed by Error nor Attaint. And if he hath no Goods of the Testators, he shall be charged of his own proper Goods. For that when he pleaded that the first Testator had fully Administred, he did not say that Assets did not come to his hands after his Testators death.

C H A P. VIII.

Of an Executor in his own wrong.

1. *Who is an Executor in his own wrong, and what Acts make him such.*

2. *How far an Executor in his own wrong is chargeable, and how impleadable.*

3. *What Acts shall not make a man Executor in his own wrong.*

4. *A caution to avoid wrongful Executorship, as also for Creditors in their Suits against wrongful Executors.*

5. *Law-Cases to this Subject Relating.*

AN Executor in his own wrong, is he that takes upon him the Office of an Executor by intrusion, not being so Constituted by the deceased, nor for want of such Constitution Substituted by the Court so Administered. Yet this extends not to Overseers, who seeking only to preserve and keep in safety the deceased's Goods from damage, without any disposing or disposing the same, are excused from being Executors in their own wrong: (a) But if one who neither is Executor nor Administrator shall use the deceased's Goods, or possess himself thereof, this is a sufficient Administration to charge him as Executor in his own wrong, whereby the deceased's Creditors may recover their Debt against him, if there be no other Executor or Administrator lawfully Constituted, who hath Proved the Will or Administered. (b) Yea, though there be a lawful Executor, yet if any other take these Goods, claiming them as Executor, does pay or receive Debts, or pay Legacies, and intermeddle as an Executor; In this Case, because of such express claiming to be Executor, he may be charged as Executor in his own wrong, although there be another Executor of right. (c) Also, he that takes the deceased's Goods to satisfy his own Debts or Legacy, shall be charged as Executor in his own wrong. (d) Also, if one do either pay Debts of the Testators, or receive Debts, or make Acquittances for them, or demand the Testators Debts as Executor, or give away Goods which were the Testators, or deliver money of the Testators for Fees about Proving the Will, or being Sued as Executor do take it upon him, and plead in Bar as an Executor; all these are an Administration and will make him Executor in his own wrong, although there be an Executor or Administrator of right: (e) But if he payes Fees or Debts only with his own monies, then it is otherwise. Likewise, if he that is named Ex-

What an Executor in his own wrong is, see Terms of Law, Kelway 19. 93. Dyer 105. 157. 255. Coke 5. 32. Brook, tit. Exec. 162.

(a) 4. & 9 Eliz. Dyer. 355, 356.

(b) Coke, lib. 5. Relat. fo. 33.

(c) l. in caus. de Minor.

(d) Coke ubi supra. fol. 30. in Conit. Case.

(e) Offic. Exec. c. 14.

cutor in the Will, take Goods of the Testators and convert them to his own use; yea, if he do but take them into his hands without converting them; yea, if the Wife named Executrix or not named, take more Apparel of her own than is necessary, this is an Administration: but if by the assent or delivery of the Executor, it is not. (f) And if he that from the Judge hath Letters *ad Colligendum*, do sell or dispose of any Goods, though otherwise subject to perishing, it makes him an Executor in his own wrong; yea, though by the said Letters *ad Colligendum* warranted so to do, for the Judge himself may not so do. (g) So that if the Ordinary without formal Letters of Administration Granted, do give one Licence and Authority to sell the Goods of the Intestate *que peritura essent*, and he doth it accordingly, he which doth so Administer, shall be as an Executor of his own wrong. (h) Also if another man doth take the deceased's Goods and sell or give them to me, this shall charge him as Executor of his own wrong, but not me. Also, if a man make a Deed of Gift of all his Goods and Chattels to another and dieth Intestate, and this Deed be but fraudulent, and in trust, and the Donee after the death of the Donor doth dispose of these Goods and Chattels; in this Case, and by these means he shall be Executor in his own wrong: (i) But if the Deed of Gift be *bona fide* in satisfaction of a just Debt, and the Goods be no more than the Debt, it may be otherwise: But if the Goods be much more than the Debt, there it seems he shall be charged so for the Overplus, and that whether he have them in possession or not. (k) So that it is evident that a man may make himself Executor in his own wrong, either by Proving the Will with the deceased's money, or by converting his Goods to his own use, or by delivering his Money or Goods to his Creditors in satisfaction of their Debts, or by receiving Debts due to the deceased, or by releasing them, or by delivering any Legacies in kind given by the deceased, or by taking a mans own Legacy before the Executor hath accepted of the Executorship, or assented to the delivery thereof, or by suing as Executor for any debt due to the deceased, or by answering as Executor to any Plea commenced against him as such, or by selling any part of the deceased's Goods as his Executor, or by discharging the Mortgages of the deceased with his money; by these and many other wayes a man may become Executor in his own wrong.

2. The Executor in his own wrong thereby renders himself not only obnoxious to the Action of the Right Executor, but also to the Suits of the Testators Creditors, yet but only so far as the Goods which he so wrongfully Administred do amount unto.

(l) And this usurping Executor, or Executor in his own wrong, is not in Suit to be distinguished from the Lawful Executor by Name.

(f) Ibid. c. 2. & Dyer. 105. & 166. & 33 H. 6. 31.

(g) Ibid. cap. 14.

(h) 9 Eliz. 256. Dyer.

(i) Sheph. Epit. verb. Testam. ubi citat Goldsb. 116. pl. 12. Brownl. 1. part. 384, 385.

(k) And so was the Opinion of Justice Jones at Gloster Assize, 9 Char.

(l) Coq. lib. Inf. 244, 245.

or Title, but to be Sued generally by the Name or Title of the Executor of the Last Will and Testament of the Defunct; which if he deny, he must plead that he neither is Executor nor Administred as Executor; yet where there is a Lawful Executor and another doth Administer in his own wrong, it is at the Election of the Creditors either to Sue them joyntly together, or one or both of them severally and by himself. But Note, that there cannot be an Administrator by wrong, or in his own wrong, for the Law knows no such Appellation. Also, if the next of Kin to the deceased procure some Insolvent person or stranger not only to take out the Letters of Administration, but also to make himself a Deed of Gift of all the Goods for an invaluable consideration, he may be thus charged for the Overplus of the worth of the Goods more than he gave, if not for the whole. And if a Debtor procure such an Administration to be taken out, and then get a Release of his Debt from such Administrator, this may make him chargeable as Executor in his own wrong for so much as his Debt doth amount unto. (m) So that all wrongful Executors of what kind soever, do, for so much as they have disposed, and no more, make themselves chargeable to any Creditor or Legatee of the deceased as far forth as any Lawful Executor is chargeable. (n) And if Administration be granted to any one after he hath intermeddled wrongfully with the deceased's Goods, this will not purge his wrong done before; and therefore in this Case a Creditor may charge him as Executor in his own wrong, or as a Lawful Administrator at his Election. (o)

3. When the Will is Proved, or Administration granted, and others then intermeddle with the Goods, this shall not make those others Executors in their own wrong by construction of Law, because there is then another Executor of right against whom the Creditors may bring their Action; (p) and such wrongful intermeddlers with the Goods when there is another Executor of right, are liable to be Sued by him as Trespassers. Also, if a man perform only acts of Charity or of Humanity, as feeding the Testators Cattle, (q) or preserve them by taking them into his custody, or dispose of them only about the Funerals, (r) or make an Inventory thereof, (s) or deliver the Widow only her convenient Apparel, or as a meer Trespasser entereth to his Goods whether quick or dead, converting the same to his own not to the Testators use, he doth not hereby become Executor in his own wrong when there is an Executor or Administrator of right. (t) But if one deliver to the Widow more of her Apparel than is convenient to her degree, or if she take, or another deliver to her more than such, he or she thereby becomes Executor in their own wrong. (u) But if a man lodge in my house and die there, leaving

(m) Stat. 43 Eliz. cap. 8. & Pluch. 75. Jac. C. B. per Chief Justice.

(n) Dyer 255. 166. Coke 5. 36. 9. 39. & 5. 33. & Plowd. 148. 145. & 33 H. 6. 31. & Dyer 210. & Plowd. 184.

(o) Coke 5. 22. Kelw. 59. Pasch. 29 Eliz. & Brownl. 1. part. 103. & 2. part. 184, 185.

(p) L. in Caus. ff. de Minor.

(q) Fitzh. tit. Execut. nu. 45. (r) Brook tit. Admin. nu. 6. 28. (s) Mantie. de Coniect. ult. vol. lib. 12. tit. 9. n. 159.

(t) Brook tit. Execut. nu. 16. & tit. Admin. n. 42.

(u) 11 H. 6. 28. & 23 H. 6. 31. & 1 Eliz. Dyer 166.

Goods.

(m) Trin. 17 Jac.
per Chief Just.

(n) Coke 5. 34.
& Kelw. 63.

(y) Crooks Rep.
in Cas. Whitmore
vers. Porter.
Mich. 3 Char.

(z) Coke, lib. 5.
33, & 34.

(a) Brook. tit.
Administ. nu. 26.

(b) 21 H. 6. 8.

Goods therein behind him, I may keep them until I can be lawfully discharged of them, without making my self chargeable as Executor in my own wrong. (n) Or if I take the deceased's Goods by a mistake, supposing them to be my own, or under colour of a Title, this will not make me Executor in my own wrong: Or if one do but take a Horse of the deceased's and tie him in his own Stable, this makes him not Executor in his own wrong: Or if I do only lay up the Goods of the deceased to preserve them in safety for him that shall have right to them. This will make me no more chargeable than if I took an Inventory of all the deceased's Goods. (x) Nor is an Executor in his own wrong chargeable as such where an Executor of right, or Administrator hath fully Administred the deceased's Goods. (y) Nor shall any light acts or intermeddlings make one an Executor in his own wrong where there is a rightful Executor, and a Will by him Proved, or Administration committed, or where there is another of right to be sued; for whoso wrongfully takes the deceased's Goods from the rightful Executor or Administrator, makes himself not an Executor but a Trespasser to them; though it would have made him an Executor in his own wrong, had there not been an Executor by right, (z) who (notwithstanding the other) stands charged with, and is liable for the debts of the Testator.

4. Whosoever feareth to be adjudged Executor in his own wrong, his safest course is not to meddle at all, but utterly to abstain from all manner of use of the deceased's Goods; and especially let him take heed that he do not sell any of the deceased's Goods, nor receive any of his debts, nor kill any of his Cattle. (a) And if one after wrongful Administration of some of the deceased's Goods take Administration, and after such Administration taken be sued by a Creditor for a Debt as Administrator, and after such wrongful Administration there remain not Goods sufficient to pay that debt, the Creditor can recover no more than remained after such rightful Administration taken, because he sued him as Administrator; therefore he should in such case have sued him as Executor, because he was Executor in his own wrong before he took Letters of Administration; and so then the Goods which were Administred before the taking such Letters of Administration must thereby be included to be liable for the debt due to the Creditor, otherwise not. (b) Therefore Creditors must look before they sue, for else they know not whether he so intermeddling be Executor or Administrator, nor consequently how to found their Action aright, and safely for good success; since a sute against an Executor as Administrator, or against an Administrator as Executor will prove frivolous; one Errour in a Foundation may

may be the Foundation of many in the Superstructure.

5. *A.* brought debt upon an Obligation of forty pound against *L.* as Executor of *P.* The Defendant pleaded, That *P.* in his life time was indebted to him in forty pound, and that there came to his the Defendants hands Goods to the value but of ten pound, which he retained towards satisfaction of his own debt, and averr'd, that no other goods beyond that value of ten pound came to his hands to be Administred, &c. The Plaintiff replied, and shewed, That the Defendant is Executor in his own wrong to *P.* and that he hath much other goods belonging to *P.* to be Administred at *S.* in the County of *N.* & conclude, & hoc paratur est verificare, &c. The Defendant rejoyn'd and demanded Judgement, whether the Plaintiff shall be admitted to Plead, That the Defendant is Executor in his own wrong, inasmuch as himself hath by his Declaration affirmed him to be *Executor Testamenti*; upon which the Plaintiff demurr'd in Law: To which point in Law the whole Court would hear the Plaintiff, for he could well Reply, That the Defendant (notwithstanding the Declaration) is Executor in his own wrong, for there is no other *Form de Court*, as was adjudged in *Coulters Case*: But *per totam curiam* the whole Plea is discontinued: for the Defendant having Pleaded, that as to the goods to the value of ten pound, he had retained them for debt to himself, and that he had no more goods to be Administred, it was an Offer of a good issue; and then when the Plaintiff replied, that he had other goods, &c. & conclude, & hoc paratur est verificare, it is not good; for he ought to have said, & hoc petis quod inquiretur per patriam, for that there was any surplusage of goods when denied by the Defendant, and urged by the Plaintiff, he ought to have come to an issue, but could not by reason of the ill conclusion. And in the same Term between *West* Plaintiff and *Lane* the same Defendant, where *West* demanded four pound debt against *Lane* as Executor, *ut supra*, and all the rest of the Plea was *ut supra*, Judgement was given for the Plaintiff, because the Defendant had confess'd goods to the value of ten pound in his hands, which is more than the debt in demand; and therefore it being in the judgement of the Law, That an Executor in his own wrong cannot retain to pay himself, Judgement shall be given only upon the Defendants own confession; and so it was: *Quod nota.* *Yelv.* a Counsel *pro Querent.*

Debt against the Defendant as Executor of *J. S.* he pleads that he had taken Letters of Administration, Judgement of the Writ, &c. The Plaintiff replied, that the Defendant Administred *de son tort*, and after took Letters of Administration, Judgement, &c. And upon this it was demurr'd, *Godfrey* for the Defendant argued, That now the name of Executor is lawfully changed before the Action

Mich. 6 Jac. B.R.
Alexander &
Lanes Case, with
West and Lanes
Case. Yelv. Rep.

Ireland. 9. Rep.
fol. 50.

Trin. 28 Eliz.
B. R. Stube ver.
highwife. Cro.
Rep. par. 3.

Action brought, and therefore is to be sued by his new name as Administrator; 9 Ed. 4. 33. 21 H. 6. 5. 18 H. 6. 29. 13 H. 4. Executors 118. *Coke contra*; for when by his tortious Administration he hath given advantage to be sued as Executor, he cannot by his own act purge this tort, and cause the Plaintiff to sue him by another name, but the Plaintiff hath election to sue him one way or other, for he shall take no advantage by his own Tort; as if one in Execution escapes, and is taken away by the Gaoler, he shall not have an *Audita Querela*; and it will be a mischief if the Plaintiff shall be compelled to sue him as Administrator, for it may be that whilst he Administred of his own wrong he wasted the goods; and if he be only sued as Administrator, he shall only be charged of the goods which came to his hands since Administration; 12 R. 2. Administrators 21. And it was afterwards adjudged, that the Writ was good, and that the Defendant *respondra ouster*. *Nota*, if Judgement be given against an Executor upon Demurrer, and Execution be awarded, the Sheriff cannot return, *nulla habet bona Testatoris*, but is to return a *Devastavit*, as if it had been found against the Executor by Verdict, for *per Curiam* he hath charged himself by his own Plea.

Anonymus, Hill.
28 Eliz. C. B.
Cro. Rep. par. 3.

Debt *per &c. vers &c.* as Executor, he pleaded *Nunquam Executor &c.* and on special verdict found, that Administration of the goods of the Testator was committed to the Wife of the Defendant, who is dead, and that he kept *bonam partem bonorum* in his hands, and sold them. *Williams* moved, this Verdict was void for the uncertainty, for *bonam partem* is altogether uncertain; but it was held to be well enough, for if he detain any part, it makes him Executor *de son tort*, and wherefore it was adjudged for the Plaintiff.

Pasch. 29 Eliz.
C. B. *Bradbury*
vers. *Reynell*.
Cro. Rep. par. 3.
14. 27.

Debt against *R.* as Executor of *T.* the Defendant pleads that *T.* died Intestate, and that certain of his goods came to the Defendants hands, and afterwards Administration was committed to *J. S.* to whom he had delivered the said goods. *Et per Curiam*, it is not any Plea, for if Administration had been committed to himself, it would not have purged the first tort: So here, although Administration is committed to a stranger, in regard that he hath once made himself chargeable to the Plaintiffs Action as being Executor *de son tort &c.* he shall never after discharge himself by matter *ex post facto*. Wherefore *&c. Adjournatur. & vid.* 21 H. 6. 8. 9 Ed. 4. 47. 2 R. 3. 20.

Trin. 12 Jac. C. B.
Keble & Osborn
vers. *Hobbs*.
49.

The Executor of *A.* brought Action of Debt against *B.* as Executor of *D.* upon a Bond, the Defendant pleaded, that *D.* died Intestate, and that before the Writ brought, Administration of his goods was committed to *N.* who Administred and yet doth; the Plaintiff replied, That *D.* died Intestate, and before the Administration

stration granted divers goods of his came to the Defendants hands, which the Defendant as Executor of the said *D.* Administred, *seu aliter ad suum proprium usum disposuit* : whereupon Issue being joyned, it was found for the Plaintiff; for since there was an Executor before the Administration afterwards granted, the Plaintiff had cause of Action vested in him, which shall not be taken away by such Administration afterwards granted, though it be before the Action brought; and so much the rather, because the goods taken by wrong before the Administration, shall not be Assets in the hands of the Administrator, till they be recovered, or damages for them.

A Woman Executrix taketh a Husband; afterwards they are Divorced upon a Pre-contract; the Wife Appeals to the Delegates; and pendant the Appeal the Husband Administred the goods, and then dieth. It was a Question, whether the Husband should be said to be an Executor in his own wrong? *vid. 2 Jac. Co. 5. par. Reads Case 33.* That when a man dieth Intestate, and a stranger taketh his goods, and useth them, or sells them, he is an Executor of his own wrong; for they to whom the deceased was Indebted have not any other against whom they can bring their Actions for recovery of their Debts: And so note, that the very seizure of goods will make one an Administrator of his own wrong.

Debt against *G.* as Executor to *H.* the Defendant pleads, that *H.* the Testator was bound in a Stat. of One Hundred Pound, and besides that he had not Assets; and hereupon they were at Issue, and a special Verdict found; That the Defendant was Executor *de son tort demesne*, and that the Testator was indebted unto him, and that he retain'd divers goods to satisfy that debt due unto himself, and over and above then to satisfy the Recognizance he had not in his hands, &c. & sⁱ, &c. It was argued by *Tanfield* and *Goldsmith* for the Plaintiff, and by *Coke* for the Defendant. The sole point was, whether an Executor *de son tort* may retain goods to satisfy himself? And *Coke* moved that he well might; and the Plaintiff by this Action against him hath allowed him to be rightful Executor; wherefore the finding that he was Executor *per tort* is not material; and he being allowed to be Executor, may do all things as an Executor, *viz.* pay Debts, or any other Lawful Acts; and as he may do it to a stranger, so he may pay himself. *Gawdy* and *Fenner* were of his Opinion. For as he shall be charged by reason of his possession: Like reason it is, he should be allowed all Lawful Acts; and this is here a Lawful Act: as where &c. *Popham* and *Clinch* *è contra*: For an Executor *de son tort* shall never have any benefit by his Malefiance; and &c. A Precedent was cited, *Pasch. 32. Eliz.* in *C. B.* That an Executor *de son tort* might not retain to satisfy himself; wherefore &c. Afterwards upon an-

2 Mar. Dyer,
105, 106.

Dyer Ibid. &
Co. 5. par. 33. *vid.*
Forster's Case.
1 Eliz. Dy. 166.
acc.

Pasch. 40 Eliz.
B. R. Ireland
vers. Countess.
Cro. Rep. par. 2.
vid. Repeat large.

66 Of Executors and Administrators. PART II.

other day it was moved again, and the Court said, They were resolved, That an Executor *de son tort de mesme* cannot retain goods to satisfy himself his own debt. And Popham said, That divers of the Justices in *Serjeants Inn* (to whom he had propounded the Case) were of that Opinion, and that they were resolved to enter Judgement for the Plaintiff: But it was then surmised to the Court, that the Defendant was dead, and thereupon a stay of Judgement was prayed; but the Court would not stay it upon such surmise: but upon the Plaintiffs prayer Judgement was entered, 5. Co. 20.

Ejectione firme, for *Whites Closter*, upon Not Guilty it appear'd upon the Evidence, That a Lease for years was granted to one *Okeham*, who died Intestate, and *Anne* his Wife assigned it *per paroll* to one *Burgess*, and after she got Letters of Administration, and made an Assignment thereof to one *Kemrick*. And the Court directed the Jury for *Kemrick* the last Vendee; yet they agreed, That if one Enter as Executor of his own wrong, and sell Goods, and after obtain Letters of Administration, the Sale is good; but in this Case there is a Term in Reversion, whereof no Entry can be made, nor can any man therein be Executor of his own wrong; and therefore the first Sale to *Burgess*, before Administration, is utterly void.

At the *Kings Bench* in Debt, all the Justices of *England* being Assembled at *Serjeants Inn*, it was Adjudged, That an Executor of his own wrong cannot pay himself either Debt or Legacy.

Debt against one as Executor; the Defendant pleaded, that the deceased died Intestate, and that certain of his Goods came to the Defendants hands, and that Administration was committed to J. S. to whom he delivered the Goods. It was adjudged no Plea, in regard he had once made himself chargeable to the Plaintiffs Action as Executor of his own wrong, he shall never discharge himself by matter *ex post facto*.

Note, in an Action of Debt brought against A. as Executor in his own wrong, he pleaded *ne unus Executor*, and it was found against him, and Execution was awarded against him for the whole debt, *viz.* Sixty pound for his false Plea, although in truth he had not intermeddled, but with one Bedstead of small value; and so it was said it was adjudged, 40 Eliz. in C. B. in *Kitchin* and *Dixons* Case.

Palsb. 25 Eliz.
B. R. inter *Kemrick* & *Burgess*.
Moo. Rep. a. 273.

Mill. 40 Eliz. B.
R. Colter vers.
Ireland. Moo.
Rep. nu. 696.

Palsb. 34 Eliz. C.
B. *Bradbury* &
Reynolds Case.
Cro. 1. Part. 565.
Hazbe's Abridg.
Vol. 3. tit. Execut.

Vid. Noy. 69.
Hazbe's Abridg.
Ibid. tit. Execut.

C H A P. IX.

Of a Child in the Womb made Executor, and of an Infant-Executor; as also of an Executor and Administrator durante Minoritate.

1. Whether the Child in the Womb may be made Executor.
2. At what age an Infant-Executor may Administer.
3. What Acts may or may not be done by an Infant-Executor.
4. To whom the Right of Administration doth belong durante Minoritate.
5. Divers Cases Reported in the Law, pertinent to this Subject.

Vid. Dyer, fol.
303, 304.
Coke, 6. 67.

1. **T**HE Child in the Womb may be made Executor; inasmuch that when such is so appointed, if the Mother bring forth Two or Three Children at that one Burthen, they are all to be admitted Executors. (a) The Law is also the same as to a Legacy given in like manner, which is to be equally divided amongst them. (b)

(a) Jaf. in l. placet. ff. de Liber. & Posthum. & Mantic. de Conject. ult. vol. lib.

2. Though an Infant how young soever he be, may be Executor, (c) or unborn as aforesaid; yet the Execution of the Will shall not be committed to him until he attain the Age of Seventeen years; for Administration granted *durante Minoritate* ceases when the Infant-Executor attains to that Age of Seventeen years. (d) And if it be a Female-Infant, and married to a man of Seventeen years of Age or more, it is then as if her self were of that Age, and her Husband shall have the Execution of the Will, and Administration thereof. (e) This limitation of Seventeen years comes in by the Canon, not by the Common Law.

4. tit. 8. m. 4.
(b) Paul. de Cast. in l. qui filiamus. §. 1. ff. de Legib.

(c) Brook. Abrid. tit. Exec. m. 115. & tit. Coverture m. 56.

(d) Coke Rep. lib. 5. in *Princes Case*.

(e) Offic. of Exec. cap. 18.

3. Although an Administration granted *durante Minoritate* doth as aforesaid cease when the Infant-Executor doth attain to the Age of Seventeen years, yet betwixt that Age and the Age of Twenty one years, such Executor cannot Assent to Legacies; (f) howbeit upon satisfaction really made he may release a debt due to the Testator; (g) for although his Actings unconformable to the duty and office of an Executor bind him not, yet such acts as are conformable to such an office done by him during his Minority (that is, till he be of the Age of Twenty one years, for till then the Common Law holds him a Minor) are binding and good in Law. (h)

(f) Coke ubi sup.

(g) Brook ubi supra. & Coke Rep. lib. 5. in *Raffels Case*.

(h) Coke ibid. *Raffels Case*.

4. Until the said Age of Seventeen years the Administration is to be committed to some other, as to the Father, or to the Guardian or Tutor of the Child; (i) who during such Minority cannot

(i) Offic. Exec. ubi supra.

(k) Coke ubi
supra. in *Princes*
Case.

Hill. 21 Eliz. B.
R. *Ruffel &*
Frail's Case.
Anderl. Rep.
Case 212.

sell or alienate, save in cases of necessity, nor Set a Lease for a longer term than the Executors Minority. (k)

5. E. R. Executor of W. R. brought his Action on the Case against T. P. supposing that divers of the Testators Goods came to the Defendants hands, &c. In which Action the Defendant pleaded a Release from the Plaintiff: Whereunto was replied, That the Plaintiff was within Age at the time when he gave such Release, and whether such Release was a bar upon a demur in B. R. was the question? where it was adjudged that it was a void Release. The matter was after removed and brought before the Justices in the Exchequer Chamber by a Writ of Errour, where all the Justices of the Common Pleas and the Barons of the Exchequer held, That the Judgement in that point was good, and that it was no Errour; for they said that an Infant-Executor cannot Acquit, Release, or Discharge a Bond without receiving the money due thereupon; otherwise he might through his own folly or ignorance charge himself of his own proper Goods, which is not allowable in an Infant to do by a Release or Acquittance without some other Act; but if upon a single Bond or Obligation he receive the money, and make an Acquittance or Release, they held that was good, and the Infant should be bound thereby; but by other means the Obligation could not be discharged; and they all held, That when a single Obligation is made to an Infant, and he during his Infancy receive the money, and make an Acquittance, he shall be bound thereby.

Trin. 6 Jac. B.R.
Croft & Wal-
banks Case, in
Yelv. Rep.

Action is brought against the Defendant as Administrator of J. S. during the Minority of D. Issue joyn'd, and found for the Plaintiff. It was alledg'd in Arrest of Judgment, That the Declaration was not good, because *non constat* whether D. were Seventeen years of Age at the time of the Action commenced; at which time the Defendant-Administrators Authority is determined; but it was adjudged, That the Plaintiff is not to shew or set forth that matter, (1.) Because the Plaintiff is a stranger to the Defendants power; (2.) Because the Defendant by joyning issue hath admitted that his power continues.

Trin. 6 Jac. B.R.
Smi. & Smiths
Case, Yelv. Rep.

Biss makes Katherine his Wife, and John his Son (aged one year) his Executors. K. Proves the Will alone, and marries the Plaintiff, and they (without the Son) bring Action of Debt as Executors against the Defendant, who pleaded in abatement of the Writ, that John was made Executor with Katherine, and that he was yet alive, nor named, &c. The Plaintiff replied, That John was not above one year of Age, that Katherine had Proved the Will, and had Administration committed to her during his minority, &c. Whereupon Yelv. demurr'd, and adjudg'd for the Defendant, *quod Billa cassetur*, for that in truth they are both Execu-

tors, and ought to be named in the Action; and albeit that *Katherine* by the Administration committed to her *durante Minori etate* hath the full power, yet the Infant ought to be named, for that she hath affirmed him to be an Executor.

Debt as Administrator to *A. L. durante minori etate W. L.* the Executor upon an Obligation, and avers, that *W. L.* was within the Age of Twenty one years. The Defendant pleaded an ill Bar, and it was thereupon demurr'd; but because the Court was resolved (upon Conference with divers Civilians openly in Court) That the power of an Administrator *durante minori etate*, doth cease at the Executors Age of Seventeen years, and that Administration committed after that Age of the Executor is meerly void, and notwithstanding this averment here, the Executor might be above the age of Seventeen years, and within the age of Twenty one years: It was therefore adjudged, *Quod Querens nihil caperet, &c. 5. Co. 29.*

HILL 40 ELIZ. C.E.
Ligot verſ. Ga-
ſeyne. Cro. Rep.
par. 3-

Trespals upon a special Verdict; the Case was, *Jackson* Lessee for years by several Leases of divers Lands, some of them in the Diocess of *York*, some in another Peculiar in the same Diocess, devised all these Leases to his Son, and made his Daughter within Age his Executrix: the Mother takes Administration *durante minori etate* of the Executrix, in *F.* the Peculiar where the Testator died, *ad Commodum & proficuum Executricis*; the Administratrix granted this Term, *durante minori etate* of the Executrix, to the Plaintiff: Whether the Grant were good or not, was the principal Question. The Court resolved, that it was not good; For such an Administrator hath but a special property *ad proficuum Executoris*, but not a general property as another Executor or Administrator hath; and therefore his sale of Goods, unless they be *Bona peritura*, or it be for necessity for the payment of debts, which he is chargeable to pay, it shall not bind: But he may sue and be sued, and yet his Authority is but a limited Authority; and therefore like as if Letters *ad Colligendum bona Defuncti* were granted to one, there he may sell *bona peritura*, as Fruit, or the like. (2.) It was moved, whether the Assent of an Administrator, *durante minori etate*, to the devise of a Term, or the Assent of the Executor himself (during his minority) to such a Devise be good? *Anderson* said, That an Executor at the Age of Eighteen years may Assent; but whether the Assent by such an Administrator be good or not, they doubted. (3.) It was moved, whether Administration should in this case be granted at Two places, viz. the one within the Peculiar, the other by the Arch-Bishop of *York*, Ordinary of the Diocess; or whether he should have the Pre-rogative in both, as he had where *Bona Nobilia* were in divers Diocesses. And it was resolved, That there should be two Letters

HILL 41 ELIZ.
Price verſ. Sim-
pfon. Cro. Rep.
par. 3.

Whether Admin-
iſtratrix duran-
te minoritate,
may Affent to a
Devise of a Term?

of Administration granted; for the Arch-Bishop shall not have any Prerogative here, because this Peculiar was first derived out of his Jurisdiction; wherefore *Ec. 5. Co. 29.*

Trin. 38 Eliz. C. B. Bude vers. Starkey. Cro. Rep. par. 3. Pl. 7.
 Errour of a Judgement in Debt in C. B. The Errour assigned was, because the Plaintiff sues by an Attorney, where he was an Infant, and ought to sue by Guardian: But because the Action was brought by him as Administrator, so that he sued in *auter droit*, Infancy is no impediment unto him, no more than Outlawrie, and therefore he might well sue by Attorney; and it was thereupon adjudged for the Defendant, that the first Judgement should be affirmed. Note, that if an Infant sue, and not as Executor, he must then sue by his Guardian; *vid. Case Bartholomew vers. Dighton, Hill. 37 Eliz. B. R. in Cro. Rep. part. 1. Pl. 22.*

Pasch. 40 Eliz. Knot & Knot Executors of Knot vers. Barlow. Cro. Rep. par. 2. Pl. 27.
 Debt upon an Obligation made to the Testator. The Defendant Pleaded a Release made by one of the Plaintiffs. The Plaintiff replies, That this Release was made without any consideration, and he who Released was within Age at the time of the Release made; and it was thereupon demurred, and adjudged for the Plaintiff, that it was a void Release, being by an Infant without consideration.

Mich. 17 Jac. B. R. Walthall vers. Aldrich. Cro. Rep. par. 2. Pl. 12. vid. Rep. at large.
 In the Case between *A.* and *M.* as Administratrix of *J.* during the minority of *L.* It was among other things Objected, That the Plaintiffs Declaration was not good, because it is brought against her as Administratrix *durante minori etate* of *L.* And it is not averr'd, that the said *L.* was yet within the age of Seventeen years, *sed non allocatur*; for true it is, that if one brings an Action, and entitles himself as Administrator *durante minori etate* of one such, he ought to shew that he is yet within the Age of Seventeen years, as *Co. 5. fol. 59. Pigots Case*. For that he is to take Conuzance how long his Authority shall continue, and he ought to shew it to enable himself to the Action: But when he brings the Action against one as Administrator *durante minori etate*, there such Plea need not be shewn; for so long as the other continues his meddling, he shall be sued; and the Plaintiffs need not take Conuzance of the age of the other; as *Ec.* And here if her Authority were determined, it should be shewn on the Defendants part; therefore the Judgement was affirmed.

Hill. 26 Eliz. B. R. Ruffels Case. Co. 5. part. Case 27. vid. ibid. 28.
 Note, it was resolved by all the Justices of England, That the Release of a Debt or a Duty by an Infant Executor, after Probate made of the Will, is not good; because it should be a *Devastavit*, and charge the Infant of his own Goods; and also it should be a wrong which an Infant by his Release cannot do; and also because it is not pursuant to the Office of an Executor.

Hill. 39 Eliz. Ford vers. Glanville. Moo. Rep. nu. 648.
 Infant Executor; Administration was committed *durante minori etate*, debt was brought against the Administrator, and then
 the

the Infant came of full age; and the Justices very much doubted whether the Action did abate.

A Guardian Recovered a debt on an Obligation made to an Infant, the Defendant paid the Principal and Costs, and prayed that the Guardian might be ordered to acknowledge satisfaction. The Court said, That a Guardian, or an Infant, or Executor, may not acknowledge satisfaction for more than they receive; and for so much they ordered the Guardian to acknowledge satisfaction: And made an Order that no Execution should issue for the residue.

If an Administration be repealed from one and granted to another, which was only *durante minori etate*, and that other bring the first Administrator to account, and after give him a Release, yet the Infant at his full age may compell the first Administrator to account to him again, and the former account to such second Administrator shall not Bar him, for such Administrators Release is not good, unless for some such cause as for which it ought to be made.

It was by the Chief Justice of the *Queens Bench* demanded of the other Justices there Assembled upon hearing of Causes, If one make an Infant his Executor, that Releases a Debt due to him as Executor without receiving the sum due (which receipt, if it be good, will be a *Devastavit* by the Infant of the Goods in his hands) whether such Release shall bind the Infant or not? It was agreed by them all, That such Release is void; for an Infant by his own Laches and Folly shall not prejudice himself. Yet a *Feme Covert* Executrix may receive money (without her Husband) which was due to her Testator, and give an Acquittance for the same; and if she gives an Acquittance for debt which causes a *Devastavit*, the Release shall be good, and the Wife and Husband bound thereby; the reason is, for that the Wifes Administring without her Husbands Consent, is and shall be accounted the Husbands Folly; but an Infants Folly shall not be reckoned to his prejudice: But if one be in debt to the Testator upon a simple Bond or Obligation, and the Infant Executor receive the money and give Acquittance; in that Case the Acquittance is good, because there is a necessity for it, for otherwise the Obliger is not bound to pay the same; and in that Case there is no folly in him.

self to deliver him the goods? The Opinion of the Justices of the Bench was, That he could not have an Action of Account, but a Detinue, or might sue in the Ecclesiastical Courts for the goods. — 36 H. 8. C. B. Anderson Rep. Cal. 88.

Trin. 14 Jac. B.
R. White ver.
Hall. Moo. Rep.
nu. 1163.

Mi Br. 10 Jac. B.
per Curiam. Rol.
Abridge. tit. Fac-
tutor. lit. M.

Hill. 25 Eliz. An-
derson. Rep. Cal.
164. vid. 16 H. 7.
fol. 5, 6.

*One makes an In-
fant his Execu-
tor, and dies; &
the Ordinary
grants Admini-
stration to a
stranger during
the Infants mino-
rity; after when
the Infant came
of full age, he
proved the Will.
Now the Quest.
was, what remedy
the Infant should
have against the
Administrator
for the goods, viz.
Whether an Action
of account, or
a Writ of De-
tinue, or to take
his Action against
the Ordinary him-
self.*

C H A P. X.

Of a Woman under Coverture made Executrix, or making Executors.

1. Whether the Husband may fix an Executrixship on his Wife without or against her consent?
2. Whether she may assume or accept the Executrixship without or against his consent?
3. The difference between the Common and the Canon, or Spiritual Law in this point.
4. How the Wife may be said to be an Executrix without her Husbands consent.
5. In what case a Wife may make an Executor without her Husbands consent.
6. In what cases she may make her own Husband, or any other her Executor.

1. IF the Husband of a Woman appointed Executrix in a Will, would have his Wife to take upon her the Execution of the Will, to which she will not assent, but refuse the Executrixship when her Husband would have her to take the Execution thereof: In this Case the Executrixship is not to be fastned on her against her will; (a) but Administration is to be granted to the next of Kin, as in case of Intestation. But if the Husband, though the Will be not Proved, doth Administer as in the Wifes Right, though against her mind and will, she will hereby be so bound and concluded, as that during his life she may not decline or avoid the Executrixship: (b) But not so after his death, for then she may in this case refuse. (c)

(a) Panor. in c. Jo. de Test. extr. nu. 2. & Olden. de Execut. ult. volut. 7. in fine. & alii.

(b) Offic. Exec. c. 17.

(c) 1 Eliz. Dyer, 166. B. where is cited 3 H. Rot. 112.

2. As a Wife named or appointed Executrix in a Will may not be compelled unto the Execution thereof, without her own and her Husbands consent: so neither shall she assume or accept such Executrixship without her Husbands consent and approbation, because it is in his power to oppose and hinder it. (†)

(†) Offic. Exec. ubi supra.

3. That the Wife appointed Executrix in a Will, may neither assume nor be compelled to the Executrixship without her Husbands consent, is true Doctrine only at the Common Law; (d) for by the Canon or Spiritual Law, which doth not, like our Common Law, distinguish between Women married and unmarried in such matters, it is otherwise. (e) For there the Wife may sue or be sued apart and alone without her Husband; and therefore in that Court the Husbands dissent, denial, or refusal would be of small

(d) Bryan Chief Just. 2 H. 7. 15.

(e) 2 H. 7. 15. b.

small force to hinder the committing of the Executrixship to the Wife, she not refusing. But by the Law of England the Wife is under the Husbands power, (f) that she is not capable of contradicting in pleading or doing other Acts; inasmuch that she could not take Lands nor Goods by Gift or Conveyance without her Husbands Assent. (g) And therefore the Husband may express his dissent as to his Wifes Proving the Will wherein she is made Executrix.

4. If a Woman Sole be made an Executrix, and she marry before she intermeddle with the Estate, and then her Husband doth Administer; this is such an acceptance as will bind her, and she can never afterwards refuse it. (b) Likewise, if once the Wife Administer, though without the Husbands privity and assent, and though no Will Proved; This will go far to conclude them both for ever after from pleading, That she neither was Executrix, nor Administred as Executrix. The Law is the same, if once the Will be Proved, and the Execution thereof committed to the Wife, though against her Husbands mind and consent.

5. A Wife or a Woman Covert, being Executrix to another, and in that Right having Goods moveable, may thereof make her Testament, and without her Husbands consent; (i) because she hath not such Goods meerly to her own use, but as representing the person of another; and therefore such Goods as she so hath as Executrix, are not her Husbands, but are to be disposed of for the use of the Testator. And not only so, but of these Goods she may make her Husband her Executor, (k) or any other person without his Licence; unless instead of making an Executor thereof, she bequeath the Goods whereof she is Executrix, by Devise or Legacy; (l) for even with her Husbands consent she cannot bequeath such Goods; or unless she is not only Executrix but Legatary also, and hath accepted of the Things bequeathed not as Executrix but as Legatary, for thereby they are invested in her Husband, (m) for which reason they cannot be given from him without his License and Consent, (n) Thus also for the continuation of this Executorship, the Wife may make her Executors and her Will as touching such Goods, Debts, or Credits, without her Husbands Consent, to whom no benefit could redound by the Administration of these Goods which his Wife hath in right of another; for those Goods would go and be to the next of Kin to the Testator, taking Administration *de bonis non Administratis*, in case the Wife should die intestate. (o) And therefore her Husband not being capable of advantage by such Goods, cannot be thereby prejudiced. And so it is but Reason that the Wife should appoint her Executors of such Goods, and continue the Executorship thereof according to the mind of the first Testator, without the Licence or necessary consent of her Husband; which Consent

(f) 33 H. 6. 32.
43. 39 Ed. 3. 1.

(g) 27 H. 8. 24.

(b) Brook. tit. Execut. 147.

(i) Fitzh. Abrid. tit. Execut. nu. 20. & Brook. eod. tit. nu. 11. & Perk. tit. Devise, cap. 8. fol. 97.

(k) Brook. ibid. & Apolog. for proceed. in Courts Ecclesiastical, part. 1. c. 3. pag. 22. in fin.
(l) Plowd. in cas. inter Bransby & Grantham, fil. 525.

(m) Traſt. de Rep. Angl. lib. 3. cap. 62.
(n) l. id quod nostrum. ff. de Reg. jur.
(o) Plowd. in cas. inter Greibrook & Fox.

A woman Covert Executrix may consent to a Legacy. If there be two Executors, whereof one a Legatary, he may consent to his own Legacy, and take it without the consent of the other assent.
11 H. 4. 83. Roll. Abr. tit. Devise.

indeed as touching all Goods and Chattels which the Wife had before Marriage, or since in her own Right, must be first had and obtained; otherwise her appointing of Executors as to them will be invalid and of no force.

6. A Woman (by the Common Law) may make her Husband Executor of such things whereof she was Executrix to another before, or of a duty due unto her before Coverture, or of a Rent being behind upon a Lease made unto her for term of life, or of other Lease, or of any thing whereof the possession must be obtained by Action: but she cannot make him Executor of that which she hath in her possession as in her own Right. (p)

(p) T. 12 H. 7.
fol. 22. Apol. of
preced. in Courts
Ecclesiastical,
cap. 3. par. 1.
pag. 22.

CHAP. XL

Of Debtors and Creditors made Executors, or Administrators.

1. How the making a Debtor Executor becomes a Release of the Debt in Law.
2. In what Cases this holds true where there are joyn-Executors appointed.
3. Under what limitations a Creditor-Executor hath precedency of other Creditors in paying himself first.
4. Law-Cases relating to this Subject.

1. IF an Executor Prove the Will, and be indebted to the Testator, the Debt is extinct in Law; (a) yea, though the Executor died before he did ever Administer or Prove the Will; (b) for the Debt is released in Law by making the Debtor Executor, though he never Administer. (c) There is the like extinguishment of the debt, if the Creditor marry with one of the Executors of the Debtor: (d) But if the Debtor take Administration of the Goods of the Creditor, this ought not to discharge him of his debt, but it ought to be as Assets in his own hands, for that the Intestate did no Act to discharge him from the debt. Also if the Obligee make the Obligor his Executor, this is a Release in Law of the Action, but the Duty remains, for the which they retain so much Goods of the Testator. (e) Likewise, if an Infant of the age of Seventeen years release a Debt, this is void: But if the Infant make the Debtor his Executor, this is a good Release in Law of the Action. (f) But if a Feme-Executrix take the Debtor to Husband, this is no Release in Law; for that is injurious to the deceased, and in Law works a *Devastavit*. (g) But if the Testator make

(a) 21 Ed. 4. 3.
61. Plowd. Com.
26.

(b) Plowd. Com.
185.

(c) 31 E. 4. 3. &
11 H. 6. 38.

(d) 1 R. H. 4. f.
83, 84.

(e) 8 E. 4. 3. &
21 E. 4. 2. Coke
Com. on Littl.
Instit. part. 1. lib.
3. c. 8. Sect. 445.
in med.

(f) Coke ibid.

(g) Ibid & Mich.
20, & 31 Eliz.

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make the Wife of one indebted to him his Executrix, it is a Release in Law, as if she herself were the debtor; but if after the Testator's death she do marry with such a debtor, then it is a devolution. (b) Also if A. and B. be made Executors; the Testator being indebted to A. Ten pound, and B. being indebted to the Testator Ten pound, in this Case the debt of B. to the Testator stands in Law extinct. (i) And as it is thus at the Common Law; so also by the Civil Law, when the Creditor maketh the Debtor his Executor, by such Executorship the debt is confounded, and that because of impossibility in Law, forasmuch as the Executor cannot bring an Action of debt against himself, being one and the same person; the Obligation therefore is by secret Act of Law disannull'd. (k)

(b) Offic. Exec. cap. 17. Sec. 1.

(i) Ibid. cap. 2. & 11 H. 7. 31. Plowd. Com. 185. contra Danby & Coke. 8 E. 4. 3.

(k) Phil. Decad. Reg. jur.

2. So also it is if any one of joynt-Debtors be made Executor, or any one of the joynt-Executors be a debtor to the Testator, for that they cannot Sue without making him who is a Debtor also a Plaintiff, which he is not capable of against himself. (l) The Law is also the same for Actions either of Trespass or Account. (m) So that if Two persons be joyntly bound to the Testator in One hundred pound, and he make one of them his Executor, this is held for a Release in Law of the Bond or debt to them both. (n) So if one make his Debtor and another his Executors and die, in this Case if that Executor who was not indebted to the Testator survive the indebted Executor, he shall not have an Action of debt against the Executor of his Co-Executor although the indebted Executor did not Administer in his life-time: for the Action was once extinguished and determined, and no Action can be brought but in the Name of them both. (o) But if one that is indebted make his Creditor and another his Executors, the Creditor may have an Action if he do not Administer; (p) But when the Testator is indebted to me and maketh me his Executor, I may detain the Goods for my debt: So that it seems, that though the Action be extinct in regard of the Testator, yet the debt is still in esse in respect of strangers or other Creditors. (q)

3. When a Creditor to the Testator is made his Executor, he may detain so much of the Testator's Goods, as whereby to satisfy himself in the first place before other Creditors. But withall, although the Testator's Creditor, being made his Executor, be in as good case or better than other Creditors of the Testator, (r) and may allow his own debt before other like Creditors, (s) and may detain so much of the Goods of the deceased in his own hands as his debt doth amount to; (t) yet this is to be understood only when he hath duly made an Inventory of the Deceased's Goods according to Law; (u) Nor hath he such a clear power to pay himself before any other, unless his debt be by Specialty or upon Record.

(l) Plowd. ubi supra. & 2 R. 2. 20. per Starkey. & 2. per Fawcett. (m) Ibid. 9 H. 5. 13.

(n) Fulbee. Parallels. lib. 1. Dialog. 7. fo. 44. & 11 H. 4. Pl. 31. & 21 E. 4. 81.

(o) 20 E. 4. 17. & 21 E. 4. 3. & 21 H. 7. 31. per Fineux.

(p) 8 E. 4. 3. per Brian.

(q) 7 H. 18. 17 H. 6. In Scir. fac.

7 El. Com. Greir. brock's Case. 275.

& Labridg. de Cas. Edit. A. D. 1599. tit. Execut.

nu. 3. & Fulb. ubi supra. f. 44. & l. Scimus. §. in Computacione.

Cod. de jure De liberandis.

(r) Dig. l. Scimus. §. in Comput. & cap. Stat.

§. Statuimus. l. 3. prin. Const. Cant.

(s) Plowd. in Cal. inter Woodward and Parry.

& Labridg. de Cas. fol. 174. nu. 3.

(t) Fulb. ubi supra. fol. 44.

(u) dict. l. Scimus. §. in Com.

(w) Plowd.Com.
185.

(x) Offic. Exec.
c. 2. nu. 4.

(y) Plowd.Com.
185. & 13 H. 3.
15. & 11 H. 4. 83.
& 12 H. 4. 21. &
20 Ed. 4. 17. &
21 H. 4. 3.

(z) 12 H. 4. 2.
& Offic. Exec.
ubi supra.

Pasch. 1 Jac. B.
per Curiam,
Roll. Abridg.tit.
Execut. A.

Trin. 7 Jac. B.
Roll. ibid. lit. G.

Co. par. 8. 135.
Sir John Need-
ham's Case.

Trin. 12 Jac. C.B.
Fryer v. Gil-
dring. Moo. Rep.
nu. 1174.

cord. (w) And as an Executor hath his Election to pay which Creditor he will first, that is of equal degree for quality of debt; so hath he election to pay and satisfy himself of what part of the Testators Goods he will, yea, though the Testators Goods amount in all to no more than his own debt. (x) And if there come not to the hands of such Executor Goods sufficient to pay himself, he may (as some conceive) have an Action of debt against the other Executor where there are more than one. (y) *Sed Quare*, Whether after he hath once Administred, specially if he pay himself any part of the debt, he have not thereby barred or disabled his Sute for the residue: Otherwise he may sue the Heir for his debt, if he hath not Administred as Executor; provided that the Bond extend to the Heir, which without expresse words it doth not, though for the Executor it be otherwise; and so may sue the Heir, if the Heir be bound and he have not sufficient Goods as Executor. (z) Alwayes observing, that although it be commonly spoken in the general, That an Executor may first pay himself, yet it is to be understood with this caution or condition, That the debt to him be of equal weight and dignity with the debts to others; for if his Testator were indebted to other men by any Statute, Judgement or Recognizance, and to him, whom he maketh Executor, only by Bond or other Specialty, then may he not first pay himself, that is, by paying of himself leave them unpaid whose debts are of a higher nature; but if there be sufficient for satisfaction both to them and himself, then is it not material which of them is first paid.

4. If an Obligee Release to the Executor of the Obligor before Probate of the Will, it is a good Release if he Prove the Will afterwards.

If a Debtee die Intestate, and the Ordinary commit Administration to the Debtor, whereby the debt is extinct, [2.] yet it shall be Assets in his hands as to debts, because the Ordinary hath no power to discharge the debt. It was agreed *per Curiam*.

If Administration be committed to the Obligor, the same doth not extinguish the debt; but if the Obligee doth make the Obligor his Executor, the same is a Release in Law of the debt, because it is the act of the Obligee himself: But if a Woman, who is an Executrix takes the Debtor to Husband, and the Husband dieth, the same is no Release of the debt, because it was only so suspended during the Coverture.

The Father and Son were jointly and severally obliged to A. who made the Sons Wife his Executrix, and devised to her all his Goods after his debts and legacies paid, and dies; the Wife Administers; the Son makes his Wife also Executrix and dies; the Wife dies Intestate, Administration of the Goods not Administred of the Obligee

Obligee was committed to F. who sues G. the Father, who was the surviving joyn-Obligor. And the Court was of Opinion, That the making of the Wife of one of the Obligors Executrix was a suspension of the Action during such time as the Executrixship continued, as 8 El. 4. 3. And *Nichols* Justice said, That a Personal Action once suspended by the act of the party, as here by the act of the Obligee, in making the Wife of one of the Obligors his Executrix, shall be Extinct for ever; otherwise, if by the act of Law. And it seemed to the Court, That by the last clause of the Devise of all his Goods to the Wife after his Debts and Legacies paid, the Obligation passed to the Wife. And inasmuch as that the duty and debt thereof is a thing in action, which by our Law cannot be transferred by a Devise, yet it shall enure as a Declaration of the intent of the Obligor, that the debt is extinct; and the Civil Law allows a Devise of debts due to the Testator to be good. And it is averred in the Principal Case, That the Debts and Legacies are all paid: whereupon Judgement was given, *Quod querens nihil capiat, &c.*

The suggestion was, That whereas one was in debt to J. S. in Thirty pound, who after by deed of Gift in his life-time conveyed all his Goods and Chattels to A. and after made the Plaintiff and B. his Executors, and devised that the Plaintiff should pay out of the Thirty pound which he owed him Ten pound to the Defendant for a Legacy; who brought the Plaintiff into the Ecclesiastical Court for the same, where by the Law the Thirty pound debt is extinct by making the Plaintiff Executor; and shewed that he had Proved the Will, &c. And *per Curiam*, the Defendant shall have a Consultation, forasmuch as the joyn-Executor hath no remedy to recover the Thirty pound against the Plaintiff his Co-Executor; nor can have any Action for the same during the Plaintiffs life, yet the debt not extinct, but remains as Assets to any other Creditor, as is 8 E. 4. And by the same reason that one debt shall satisfy another debt, it shall satisfy a Legacy also; and much the rather, in regard the express intent of the Testator was to that purpose, having precisely limited the Legacy to be paid out of the debt. *Quod nota per totam Curiam*. And Consultation was granted accordingly. *Telv.* Council for the Plaintiff.

Mich. 7 Jac.B.R.
Flad & Ruw.
Jey's Case, Yelv.
Rep.

Debtor sait Executor, uncore il palette Legacies.

C H A P. XII.

The general difference between an Executor and an Administrator ; and wherein they generally agree.

They differ thus, *viz.* An Executor is made either by the Testator, or by his own Acts ; but an Administrator is appointed only by the Judge. An Executor may appoint an Executor to the first Testator, so cannot an Administrator ; yet a bare and meer Executor, or a naked Executor to whom nothing is bequeathed in the Will, made choice of meerly for his care, and not at all for his profit, cannot bequeath the Testators Goods in his Will by Legacies, no more than an Administrator ; for these Goods are to be employed only for the behoof of the Testator, in which respect such Executor is accountable as well as an Administrator : But of the Profits and Fruits which happen and arise of those Goods which belong to any as Executor he may make his Testament, though not of the Goods themselves ; and so also in some cases may an Administrator. They agree thus, *viz.* An Administrator is entitled to all the Goods and Chattels of the Intestate, as well as an Executor to all the Goods and Chattels that belonged to the Testator ; they are both alike liable to the payment of Debts and Legacies, and they are both accountable. These are the most general things wherein they differ and agree. Their more particular agreements and disagreements are very many according to their distinct Beings, Interests, and Offices : For which reason the Reader for his fuller satisfaction in this point is referred to his own Observations from the Contents of the several Chapters of this Testamentary Treatise.

C H A P. XIII.

Of the Executors Rights exclusively to the Heirs.

1. *The several divisions and distinctions of such things as come to the Executor, and what Chattels are.*
2. *Of such Chattels real, living and moveable, as accrew to the Executor.*
3. *Of such Chattels real, without life and immoveable, as go to the Executor.*
4. *Of Chattels personal, living and moveable, belonging to the Executor.*
5. *Of Chattels personal, without life and moveable, pertaining to the Executor.*
6. *Several Laws in reference to this subject.*

1. **A**LL things that come unto an Executor may be divided into things possessory and actually in the Testator, or into things only in action and not actually in him; and the things possessory may be divided into Chattels real and immoveable, or into Chattels personal and moveable. Again, the possessory Chattels real may be divided into things living, or into things without life. Also the personal Chattels or Goods moveable may be divided into things living, or things inanimate and without life. There are also comprehensive of some of these, Chattels principal, and Chattels accessory that follow the principal. So that Chattels are all possessions of Goods moveable and unmoveable, except such as are in the nature of a Free-hold or parcel of it. And they are called real or immoveable, either because they are such in their own nature; or because they appertain to something real by way of dependance, as a Box with writings of Land, the body of a Ward, the fruit of a Tree, or the Tree it self upon the Land; or because they issue out of things immoveable and of a more real nature, as Leases for years, at Will, Wardships, Tenants Estates by Statute Merchant, Staple, or Elegit, and Grants of the next Advowson.

2. The *Chattels Real, Living and Moveable*, which did accrew to the Executor, were such as these, *viz.* Wardship, being a real Chattel in respect of a Tenure of Land, whereby was intended such Wardship as was by Knights Service, and not such as is by Socage Tenure; also a Villain for years, as by Grant for a Term from him that had the Inheritance.

3. The *Chattels Real without Life and Immoveable*, that go to the

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the Executors, are generally and for the most part in Houses or Lands, by Lease, or extent upon Judgements, Statutes, or Recognizances; or in things issuing out of Houses or Lands, as Rents, Commons, and the like; as arrerages of Rent behind at the Testators death; also Advowsons, Tithes, Fairs, Markets, Profits of Leets, and the like which the Testator had only for years. Also, the Title accrewed to the Crown upon Attainder of Felony, where the party held not of the King, *viz.* the *Annum, Diem & Vastum*, that is, power not only to take the Profits for a year, but also to waite and demolish, &c. is but a Chattel; And therefore though granted to one and his Heirs by the King, yet shall go to the Executor not to the Heir. (a) Also, a Lease for years determinable upon lives, which is a Chattel, and shall go to the Executor; (b) As also doth an Extent upon a Statute. Likewise, if a Term for years grant his Term by Bequest or otherwise to A. and his Heirs; if A. dies, his Executors, not his Heirs shall have it, for it is no Inheritance. Or if such a Term grant a Rent out of the Land to A. and his Heirs, or the Heirs Male of his body, yet shall it go to the Executor not to the Heir; for it being derived out of a Chattel, it self remains a meer Chattel, and becomes not any Inheritance. (c) Also, if a Rent be granted out of Land to one in Fee-Simple, Fee-Taille, for Life or Years, and it be not paid to him in his life-time, the Arrerages shall go to his Executor not to his Heir. Or if a man seized of Land and possessed of a stock of Cattell, Let it for Years and Covenant with the Lessee that he pay to Him and his Wife, their Heirs and Assigns, one hundred pound *per annum* during the Term; in this Case after the death of the Lessor, his Wife surviving him, her Executor and not his Heir shall receive this payment. (d) Again, if A. grant the next Presentation of the Church of B. unto D. In this Case if D. dies, his Executor shall have it as a Chattel. (e) Not the Heir. Or if A. grant a Lease for years of Land to D. and his Heirs, and dies; his Executor and not his Heir shall have this Term. (f) And if A. possessed of a Term of years of Land, grant it by Deed, or give it by Will to D. and his Heirs, or to D. and his Heirs Males, or devise it by Will to B. for life, the remainder to D. and his Heirs; in these Cases D. shall have these Terms of years as Chattels, and after his death his Executor shall have them. (g) Also, if a Lessee for life make a Lease for years absolutely; This in Law is a Lease for so many years, if the life live so long, and shall go to the Executor after his death. (h) And if one makes a Feoffment in Fee of Land, the Feoffee covenanting to do divers things to the Feoffor, and to forfeit five pound to him and his Heirs as oft as he shall fail performance, and the Feoffee doth fail and break his Covenant divers wayes, and the Feoffor dieth; in this case his Executor, not his Heir,

(a) No. Na. Bre. 88. Reg. Orig. fol. 103.

(b) 37. Ass. p. 11. An Executor of a Lord shall have Fines Assessed upon the Tenants at their admittances in the Lords time.

Rent.

(c) Offic. Exec. cap. 5.

(d) Dyer. 275.

(e) Dyer. 283. 34 H. 6. 27. Presentation.

(f) Coke 10. 87. Littl. Sect. 740. Fitzh. Account. 56. F. N. B. 120. & Brownl. 1 part. 77. 106. Terms of years.

(g) Coke 8. 95. 10. 87. Plowd. 524.

Lease for years. (h) Brownl. 19. 20. 1. part. Coke 7. 12.

Forfeitures on breach of Covenants.

Heir, shall have and recover all the Forfeitures that are past and unpaid. Also if any Goods or Chattels be granted to any Heads of Bodies Politick and their Successors, their Executors and not their Successors shall have them. (i) In like manner, if a Lease for years be made to a Bishop and his Successors and he die, his Executor, not his Successor, is to have it. (k)

4. Among the living Chattels Personal that go to the Executor, may be comprehended an Apprentice for years, the interest of a Debtor in Execution for debt, and in a Prisoner taken *Jure belli*.

(l) Also Cattel of all kind; yea, and Fishes in a Pond, Conies in a Warren, Deer in a Park, Pigeons in a Dove-house, where the Testator was but a Termer or Lessee thereof, for then they are to go to his Executor as Accessory Chattel following the State of their Principal, viz. the Pond, Warren, Park, and Dove-house: (m) Or if the Conies, Pigeons, or Deer were all tame, they are then likewise to go to the Executor, and not to the Heir; so likewise are Hawkes reclaimed; yea, it is felony to steal Hawkes young in the Nest; which implies that they are Goods and belong to the Executor. (n)

5. Chattels Personal, without life and moveable, as all Householdstuff, Implements and Utensils, Money, Plate, Jewels, Corn, Pulse, Hay, Wood felled, Wares, Merchandise, Ships, Carts, Plows, Coaches, &c. are evident to belong to the Executor, not to the Heir. And generally all things sowed and not arising from the Earth without manuring, go to the Executors; and such things as grow of themselves to the Heir; therefore Corn in the field growing or standing shall go to the Executor. (o) Also Hops, though not sowed if planted; likewise Hemp and Saffron do like Corn growing pertain to the Executor. Also after Corn reaped, and before the Tythes set out, the Inheritor of the Tythes dying, his Executor and not his Heir seems to have the best right to the Tythe after set out. (p) Also things above ground in Gardens, as Mellons of all kind, and the like, go to the Executor, not to the Heir; as also all other things as have such a yearly setting or manurance, as severs them in interest from the soile. (q) Also the Writings and Evidences that concern not the inheritance, but only Leases, Terms, Goods, Chattels, or Debts, pertain to the Executor. If one that holdeth Land for the Life of A. B. sow the Land, and A. B. happen to die ere it be ripe and cut, and he that so holdeth the Land happen to die also before it be ripe, the Executor of the Tenant shall have the Corn. And if the Tenant in Tayl sow the Land he doth so hold, and die ere it be cut, the Executor, not he in Reversion, nor the Heir, nor the Issue in Tayl shall have it. Also, if A. make a Feoffment of Land to B. excepting the Trees thereon, which he afterwards grants to B. for years;

(i) Sheph. Epit. chap. 155. fo. 933.

(k) New Terms of Law. Tit. Assigns. & Coke sup. Littlet. 46.

(l) No. Na. Br. 88. Reg. Orig. fol. 102.

(m) Offic. Exec. c. 5. §. 1.

(n) Ibid. cap. 5.

Corn standing.

(o) Perk. tit. Devises, fol. 99.

Hops.

Tythe set out.

(p) Offic. Exec. supra.

Garden Fruits.

(q) Ibid.

Writings and Evidences touching Chattels.

Corn standing.

Trees.

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- in this Case the Trees are in the Nature of a Chattel, and if B. dies his Executor shall enjoy them. (r) Or if A. seized in Fee of Lands whereon Trees grow, sell these Trees to B. who then dies before they be felled; in this Case the Executor or Administrator of B. shall have them, and may sell or cut them down. (s) Lastly, The Executor without contradiction of the Heir may in any convenient time after the Testators death, enter into the house descended to the Heir for the removing and taking away of the Goods, so as the door be open, or at least the key be in the door; (t) but he cannot justify the breaking open of the door of any Chamber to take Goods thence: But if the Goods be not removed in convenient time, the Heir may distrain them as *Damnage Resante*.
- (u) If a Lease for years be made to a Bishop and his Successors, and he die, his Executor, not his Successor is to have it. (v) If a Presentment to a Church happen to a Tenant in Tayle, and he die before he Presents; his Executor, not his Issue in Tayle shall Present, because the Chattel is not devested; Likewise if a Termor have a Presentment which doth happen during the Term, though he do not Present, yet he shall have it. (w) If a Parson, Vicar, Master of a Hospital, or any Body Politick be possessed of any Goods or Chattels in their own Right, and die, they shall go to their Executors or Administrators, not to their Successors. (x) If a Lease be made for years, or the next Advowson of a Church, or Covenant for payment of money or the like be granted, or an Obligation made to one and to his Heirs; In all these Cases he hath this as a Chattel, and it shall go to his Executor, and not to his Heir: So if any such thing be granted to one and his Successors, his Executors shall have it: And if the Heir or Successor get the Deed, the Executor may Recover it from them. (y) If one hath a Box, or Chest, or Trunk full of Writings at his death, and the same is open, not sealed or locked; this shall go as Goods to his Executor: but if it were sealed or locked, as incident to the writings, it would be the Heirs whose the Writings be. (z) If a man hath a Term, and Devise the same to one, and the Heirs of his body; his Heir shall not have it, but it shall go to his Executors, because a Term which is but a Chattel, cannot be Entayled. *vid.* 28 *Eliz.* *Peacock's* Case, and 21 *Eliz.* *Higgins and Mills* Case, Adjudged acc. In like manner, if a Devise be made of Land to one, and the Heirs of his body for Five hundred years, it is a Release for years, and his Executors shall have it; For an Executor shall have all Leases for years; and although the Heir, and not the Executor, shall have the writings which concern the Inheritance, yet the Executor and not the Heir, shall have the Chest wherein such writings are, if the Chest were not lock'd; but if lock'd, then the Heir shall also have the Chest, as aforesaid.
- C H A P.

(r) Coke 4. 62.

(s) Coke 11. 50.
& Perk. Sect. 58.

(t) 21 H. 6. 20.
If other Goods
chance to be tak-
en among them,
he is excused.
21 H. 7. 25.
Vid. Lib. Inti.
640.

(u) New Terms
of Law. Tit. Af-
signs. & Coke
sup. Littl. 46.

Presentment to a
Church.

(v) F.N.B. 34. d.
B. Perk. Sect. 97.
Bodies Politick.
(w) Co. 4. 65.
Perk. Sect. 58.
Advowson.

(y) Littl. Sect.
740. 14 H. 4. 24.
24 H. 6. 27. F.N.
B. 120. Broo.
Oblig. 18. 68.
Fitz. Account 56.
Knight of Writings.

(z) 22 Ed. 4. 7.
& 3 H. 7. 15.

Co. 10. Leves 87.

18 Ed. 4. 1. 41 Ed.
2. 2. 14 H. 4. 6.
Roll. Abr. tit.
Execut. lit. v.

CHAP. XIV.

Of the Heirs Rights exclusively to the Executors.

1. *Of things Personal, that go to the Heir, not to the Executor.*
2. *Of things Real, that belong to the Heir, not to the Executor.*
3. *A Law Case touching the same.*

1. **T**O the Heir, not to the Executor, do belong Fishes in a Pond, Copies in a Warren, Deer in a Park, and Pidgeons in a Dove-house, where the Testator had the Inheritance in the Pond, Warren, Park, or Dove-house; for such are not Chattels at all in that case, nor to go to the Executor, but to the Heir together with the inheritance. (a) Also Grass growing for Hay, and Trees growing or standing (except as in the last precedent Chapter) and the Fruit thereon, go to the Heir not the Executor, (b) Also, Glasse, whether by nails or otherwise affixed to the windows, either by the Lord or the Lessee, descends not to the Executor but to the Heir, as being made parcel of the Freehold or Inheritance of the house. (c) But if there be Glasse from the windows, or Wainscot loose, or doors more than are used, that are not hanging, they shall then go to the Executor. (d) As to the Heirs Rights the Law is the same as to Wainscot if affixed or fastned to the house; (e) yet by the Civil Law such things as are in the house more for Ornament than Structure, pertain not to the house. (f) Nor is it material whether the Wainscot be fastned by great or little nayles, by skrews or irons thrust through, or by other wayes or means; for it sufficeth to make it parcel of the Freehold, and consequently to go to the Heir not to the Executor, if it be any way affixed or fastned to any part of the house. The Law is also the same concerning all things fastned to the Freehold or to the ground by mortar or stone, as Tables, Dormant, Leads, Mangers, Millstones, Auvils, Doors, Keys, Glasse-windows and the like; for none of these be Chattels, but parcels of the Freehold, and therefore belong to the Heir, not to the Executor. (g) Also Writings and Evidences that concern the Inheritance do pertain to the Heir; also the Boxes and Chests wherein the Writings and Evidences of Inheritance are kept, and usually have ever been employ'd only for that Service, shall go to the Heir not to the Executor, whether sealed or not sealed, lock'd or not lock'd. (h) Also in some Cases Corn in the ground shall go to the Heir not to the Executor; for if a Lessee for years Certain sow the Land a little before the end of his Term, and the Term end before it be cut; in this Case he that is

(a) Kelways Rep. fol. 118.

(b) Perk. tit. Devise, fol. 99.

(c) Coke Rep. lib. 4. in *Hierakenden's Case*, in fin. fol. 63, 64.
(d) Coke 4. 63. at H. 7. 26.

(e) Coke ubi sup. in *Hierakenden's Case*.

(f) Rebuff. & D. D. in L. pen. ff. de Verbo. Sign.

In the latter end of H. seven's time, an Executor taking a Furnace, which was set in the middle of a Room, and not fixed to any wall, was adjudged as a Trespasser to the Heir.

(g) Kelways Rep. fol. 88. nu. 2. & Labridg. dez Cases tit. Execut. fol. 181. nu. 4. & Offic. Ex. ubi supra.

(h) Offic. Execut. 3. & 41 E. 2. 1. & 26 H. 6. 26. & 28 E. 3. 4. & 3 H. 7. 11.

(i) Dyer 316. &
D. & Stud. 35. &
Perk. Sect. 59.

(k) Hill. 7 Jac.
B.R. per curiam.

(l) Offic. Ex.
cap. 5.

(m) St. 33 H. 8.
cap. 37. & Coke
4. 48.

(n) Offic. Ex.
ubi supra.

(o) Litt. Inst. lib.
3. cap. 5. Sect. 319.

(p) Ibid.

43 E. 3. 2. 10 E.
4. 5. 6.

(q) Perk. tit.
Devise, fol. 104.
105. & Brook
Abridg. tit. De-
visis, fol. 19.

to have the Land, not the Executor of the Lessee for years shall have the Corn. (i) And if one be seized of Land in Fee, and there- of make a Lease for years, paying Rent at *Michaelmas*, or within ten dayes next after, and the Lessor happen to die within the term after *Michaelmas*, and before the ten dayes expired; in this Case the Heir of the Lessor and not his Executor, shall have the last half years Rent due at *Michaelmas*. (k) Lastly, Things under ground, whether in Gardens or elsewhere, as Carrets, Parsniips, Turneps, Skerrets, and other such like things under ground, shall go to the Heir, not to the Executor. (l)

2. Where a Rent is reserved upon a Lease for years, there it shall not go to the Executor, but to the Heir with the Reversion, other than the Arrerages of such Rent as were behind at the time of the Testators death, for such belong to the Executor not to the Heir. (m) If *A.* mortgage the Inheritance of Land to *B.* upon Condition of Redemption by payment of one hundred pound to *B.* his Heir or Executor, and *B.* dies, the Deeds being delivered into his hands: In this Case the Heir not the Executor shall have the Deeds; for though the money may be paid to the Executor, yet in the mean time the Land descends to the Heir; nor is there any debt to the Executor, because it is in the Election of *A.* whether he will pay or not. But if on the other side the Land had been sold for one hundred pound not paid to *A.* but a Condition, that if not paid to him, his Heir or Executor by such a day, then to Re- enter, and *A.* dieth: In this Case there is a debt to his Execu- tor, and no Land descended to the Heir of *A.* yet shall the Heir have the Deeds, because there is a Condition descended to him. (n) But if a Feoffee in Mortgage, before the day of payment which should be made to him, make his Executors and die, and his Heir entereth into the Land as he ought; In this Case the Feoffor ought to pay the money at the day appointed to the Execu- tors and not to the Heir of the Feoffee: (o) Unless the Condi- tion were, that the Feoffor pay to the Feoffee or to his Heirs such a sum of money at such a day, then it ought to be paid to the Heir. (p) Also where the Testator recovereth Land and Damgages, or a Deed and Damgages, and dies before Execution, the Heir shall have Execution for the Land or Deed, and the Executor for the Damgages; but until the Heir sue a *Scire Facias*, the Executor can- not sue Execution for the Damgages; for Execution must be first of the Deed, then of the Damgages. Also, if Executors keep in their own hands for the space of one, two or three years Lands devised by Will to be sold for any purpose, converting in the mean time the profits thereof to their own proper use, the Heir of the Testator may enter to the Lands, and put out the Executor, (q) unless the money for the Land to be sold be to be distributed

in *pior usus*; (r) because in this Case the Frank-tenement after the Testators death is in the Executors, not in the Heir; (s) for which reason the Heir cannot enter in this Case as he might in the former.

3. In an Action of Debt brought against Executors; They were at Issue if Assets were in their hands or not; and the Jury found by a Special Verdict, That the Testator was seized of a House in Fee, and made a Lease thereof, and of certain Implements of household in it for years, rendering Rent to Him, his Heirs, and Assigns; and found that the Executors after the death of the Testator, continually received the Rent, and prayed Advice of the Court, if the same were Assets in the Executors hands? And the Opinion of the Court was, That it was not Assets; for that the whole Rent was to go with the Land in Reversion, as *magis digne*; and so did belong to the Heir, not the Executors. (t)

A man Willeth, that after twenty years after the death of the Devisor, *7. S.* shall have the Land in Fee; the Heir of the Devisor shall have the Land during the Term, and not the Executor. (u)

(r) Ibid.
(s) Kelways
Rep. fol. 102.
108. nu. 25.

(t) Hill 20 Eliz.
Dyer 367. vid.
Flo. Com. 114.
& 259. acc.
(u) Dyer's Read.
in St. of Will.
Sect. 3. §. 4.

* By the Civil Law, *Bona Paraphernalia* sunt quæ Muller ultra dotem adfert (it is a word borrowed from the Greek) & de his bonis Maritus Administrationem habet, id est sine speciali uxoris mandato, & agere & convenire possit. Myns. Inst. 97. Mention is made thereof at the Common Law, where it is called *Bona Paraphernalia*. 12 H. 7. 23. 18 Ed. 4. 11. b. And the Wife's Apparel is called *Bona Paraphernalia*. 18 E. 4. 11. B. per Warburton. The Wife after her Husband's death shall have the apparel necessary for her, and not her Husband's Executor. 27 H. 6. 28. & 33 H. 6. 31. Bro. Execut. 19. (a) I. hac lege, & leg. fin. Cod. de Pact. Covent. sup. doco. (b) *Lob maritorum*. Cod. Ne Uxor pro Marito. (c) Dyer fol. 166.

CHAP. XV.

What goes neither to the Heir nor Executor, and in what Cases.

1. *Bona* Paraphernalia go neither to the Heir nor to the Executor.*
2. *Things in joynt-Tenancy go neither to the Heir nor to the Executor.*
3. *Things wiled by the Testator to be sold for certain uses, go to neither of them.*
4. *A Lease simply for Three Lives goes neither to the Heir nor Executor.*

1. **B**Y the Civil Law those Goods belonging to the Wife, called *Bona Paraphernalia* (a) descend neither to the Heir nor to the Executor, neither are they by that Law subject unto the payment of the Husband's debts: (b) But now under that notion of *Bona Paraphernalia* we are not to understand the Wifes Apparel, with her Bed; Jewels and Ornaments for her person, to be comprehended, but her convenient Apparel, and onely such as is agreeable to her degree; (c) and such shall go to the Wife onely, the rest unto the Executor. And thus much the very

word.

(d) *What Paraphernalia are, see Alex. lib. 1. Confil. 42. Col. 6. verif. nec Obstat. & Lib. 2. Confil. 63. Col. ult.*

word being Etymologized doth imply. (d)

2. The Goods and Chattels which one hath in Joynt-Tenancy with another, shall not on his death go to his Executor nor to his Heir, but to the other surviving Joynt-Tenant, and that by right of survivorship. Otherwise it is with Tenants in common; for if A. and B. have Goods or Chattels in Joynt-Tenancy, and if either of them grant what belongs to him, unto a Third person; in this Case, that Third person, and he which kept his part unfold are Tenants in Common; and therefore if either of them Two die, the deceaseds part of such Goods and Chattels shall go to his Executor, and not to the surviving Tenant in Common. (e) Also if Husband and Wife be Joynt-Tenants of Land, and the Husband die, the very Corn growing thereon shall survive to her, together with the Land; and though the Husband sowed it, yet shall it not go to his Executor. (f)

(e) Littl. Sect. 281, 229, 324. & Perk. Sect. 325, 326.

(f) = Eliz. Dyer.

3. The Monies or Profits arising out of Lands Willed by the Testator to be sold, are not accounted as any of the Goods or Chattels of the person deceased; (g) and consequently do go neither to the Heir nor to the Executor, but to the uses for which it was willed to be sold.

(g) 21 H. 8. 5.

4. If one have a Lease simply for Three Lives to him and his Assigns; this is no Chattel, therefore shall not go to the Executor; and it is no Land, therefore it shall not go to the Heir; but in this Case it shall go to him who first after the Testators death Enters and Claims it as an Occupant, if no assignment thereof be made in the life-time of the L. see. (b) But a Lease for years, determinable upon Lives is a Chattel, and shall go to the Executor. (i) So also doth an Extent upon a Statute.

(b) Offic. Ex.

cap. 3.

(i) 37 Affp. 12.

C H A P. XVI.

Of the Indivisibility of the right and interest of Co-Executors.

Their Indivisibility { 1. In point of Power and Authority.
2. In point of Interest and Possession.
3. In Case of Plaintiffs and Defendants.

1. **W**Here there are more Executors than One, or Joynt-Executors to the same Testator, One of them cannot give nor release his Interest to the other; or if he doth, it is void; and he who so releaseth, shall still have as much Interest as he to whom he released, because each had the whole before. (a) Therefore if one

(a) 9 E. 4. 22, 24.
31 E. 2. 13.
40 H. 8. 21, 22.

one Executor release but his part of a debt, it hath been held that the whole is discharged. But if one Executor alone sell Goods of the Testator, he alone may maintain an Action of debt for the money. (b) So if Goods be taken out of the possession of one Executor, he alone may maintain an Action for the same, and that without naming himself Executor. (c) Also, one Executor not joyning in suit with another, may any time before judgment release, but after judgement he cannot, because then it is altered in nature, and turn'd into *Rem Judicatam*. And though many Executors to one and the same Testator make but one Executor, yet the devastation, waste, or misdoing of one shall not charge the rest, nor make their Goods lyable for recompence; (d) but himself shall answer for it with his own Goods, yet no further than the value of the Testators Goods so wasted or misadministred.

2. If one of the Executors where there be Two or more, grant his part of the Testators Goods, all passeth, and nothing is left to the other; for that each hath the whole, and there be no Parts or Moities between Executors; Thus, if an Horse come to four Executors, each hath a Horse, and yet all four have but one. Also, though a Lease for One thousand Years of One thousand Acres of Land come to Two Executors or more, no partition or division can be made between them, because it is not between them as between joynnt-Lessees of Land, where each hath but a Moitie in Interest, though possession of and through the whole; but among Executors each hath the whole; and therefore if he grants his part, he grants the whole; yet one Executor may demise or grant the Moitie of the Land for the whole term, and so may the other: and this way they may settle a Moitie for each in some Third person intrusted for them; but one Executor cannot make a Lease to the other of any part, because he had the whole before; nor can one of them Sue the other as Executor, unless the Testator devise to one of his Executors all his Goods, after such Debts and Legacies paid and satisfied; for in such Case after satisfaction thereof that Executor may take the remainder of the Goods, and maintain an Action of Trespas against the other if he take them from him, and consequently an Action of Detinue if he keep or detain them; but this he may do not as Executor, but as Legatee.

3. Where there are divers Executors, they are all but as one person, and therefore cannot plead several pleas being sued; (e) all of them represent the Testators person, and they must all joyn in Suits as Plaintiffs, and be joyned as Defendants, or at least so many of them as have Administred; therefore one Executor sued, if he plead that there is another Executor not sued, must also plead that that other hath Administred. (f) Thus Executors, though

never

(b) 38 E. 3. f. 9.

(c) Offic. Ex. c. 9.

(d) Book of Ex-
trict, and so held
in An. 12 H. 7.
Lib. Entr. f. 327.
& Kelw. Rep. 60.
23. & 11 H. 6. 30.
& 24 Eliz. Dyce
210. & P. 4 H. 8.
Rot. 303. Tr. 34.
El. Pass. 36 Eliz.

Two have a Lease
for years as joyn-
t-Executors, if one
of them alien the
whole, it shall
bind the others; for
each hath an en-
tire power to dis-
pose the whole,
both being posses-
sed in right of the
Testator. 37 Eliz.
B.R. inter Pan-
nel & Fen. Ag-
reed and Ad-
judg'd. Roll. Abre-
vit. Execut. lit. O.

(e) 37 H. 6. 17.
9 H. 6. fol. 44.
38 E. 2. 9 Brookes.
Exec. 13. 20. 21.

(f) 9 H. 6. 14.
Bro. 13. 23 H. 6.
38 Bro. 20.

- never so many represent the person of the Testator, as one person. (g) Therefore all of them shall have but one Essoyn, neither before appearance nor after, because their Testator himself, whose person they represent, could have no more. And therefore where Executors as Defendants have appeared, if any one of them will confess the Action, this binds and concludes the rest; but if one will plead one Plea and the other another, some are of Opinion, that that shall be received which is best for the Testators Estate. So where they Sue, such as will not prosecute shall be severed, and the rest without them may proceed. (b) It is evident by what hath been said, That Two Joynt-Executors being Sued cannot plead two distinct Pleas, because they both represent but one person, viz. the Testator, who could have but one only Plea. (i) Yet others say, they shall have several pleas, and the most peremptory shall be tried. (k) And if any one of Joynt-Executors Plaintiffs dies, the Writ abates, though he so dying was for non-appearance on summons before severed; and so it is, if one of the Co-Executors Defendants dies. Yea, if a Creditor Sue A. B. C. as Executors, where only A. and B. are Executors, even there by the death of C. the Writ abates. Also if a man make Three Executors whereof Two refuse the Administration, yet they shall be Executors by the Will, and may Administer when they please, and an Action ought to be in all their Names, otherwise the Writ shall abate. (l)
- (a) 9 Ed. 3. cap. 3.
(b) Offic. Ex. c. 9.
(c) 37 H. 6. 30.
8 7 M. 4. 13.
(d) 8 Ed. 4. 24.
Execut. 31.
(e) Fulf. Paral.
part. 2. Dialog.
3. fol. 33.

C H A P. XVII.

Of the Executors Interest and Possession; and how it differs from that which he hath in his own proper Goods.

1. *What may be said to be in the Executors Actual Possession, or not.*
 2. *How the Executors Interest in the Testators Goods differs from that which he hath in his own.*
 3. *Whether an Executor may by Will bequeath the Goods he hath as Executor.*
 4. *Whether the Administrator of an Intestate Executor may intermeddle with the Goods of the first Testator.*
 5. *How Testators and Executors are Correlatives as to Chattels.*
1. **I**N Chattels Personal the Executor hath such an Actual Possession presently upon the Testators death, though never so far distant from him, and without any laying his hands actually on

on them, as that he may maintain an Action of Trespass against any taking them away or spoiling them, though he or any for him never came near them. (a) but Chattels Real, as Leases for years, are not in his possession, till himself or some for him actually enter thereupon. (b) But a Lease for years of Tithes, be the Executor never so far distant from them at the time of the Testators death, shall be in his actual possession instantly upon the setting out thereof, so as he may maintain an Action of Trespass against any that shall take the same so set out, though he, nor any for him did never actually lay their hands thereon. (c) But in Glebe Lands into which Entry may be made, the Case may be otherwise. Nor are Debts accounted to be in the Executors hands till recovered: So likewise Arrears of Rents, yea, of Inheritance behind in the Testators life-time; for Executors are qualified to receive them also.

(a) Offic. Ex. cap. 10. in prin.

(b) Perk. 6. 1.

(c) A. 5 E. 1. 17.
& 1 H. 6. 43.

2. An Executors Interest, as Executor, is only in his Testators Right; (d) his Interest in his own Goods is absolute and proper; therefore, though the Lord of a Villain might take all the Villains own Goods, yet he might not take the Goods he had as Executor. (e) And from hence some have been of Opinion, that an Executor granting all his Goods, these are excepted which he hath as Executor, except the Executor (according to the Lord Dyer) who is the Grantor, be named Executor in the Grant. (f)

(d) Coke lib. 9.
83. b. in Finch.
and Case.

(e) Littl. tit.
Villanage, 42, 43.

(f) Offic. Ex.
cap. 7.

3. Nor can the Executor by Will bequeath the Goods he hath as Executor, without a precedent alteration of the property thereof, and with a Reconveyance thereof back to himself again.

4. An Executor dying Intestate, his Administrator cannot meddle with those Goods the Intestate Executor had as Executor, but thereof Administration must be granted. As *De Bonis non Administratis* to the next of Kin of the Intestate Executors Testator. For the reason aforesaid, the Goods which a man hath as Executor, are not liable for the Executors debts, and therefore cannot be taken in Execution for his own proper debts. (g) For the same reason also the Goods which a Woman hath as Executrix, are not devested out of her into her Husband by marriage, nor can he have them after her death without being his Wifes Executor. Upon the same ground it is (as was but now hinted) that the Goods and Chattels of the first Testator in the hands of his Executors Executor (no alteration of the property thereof being made by his Executor) shall not be liable for satisfaction of the debts of his said Executor: As thus, suppose A. makes B. his Executor and dies; B. makes C. his Executor and dies; Now if B. made no alteration of the property of the Goods of A. but merely left them to C. In this Case the Goods which so came to B. as Executor to A. and so from B. to C. shall not be liable in

(g) Plowd. Com.
52. 5. Inter
Bransby & Gran-
tham, p. 30 Ellis.

Law to pay the debts of B. the immediate Executor of A. There is a further discovery of an Executors Interest as to Chattels Real, wherein Testators and Executors are as Correlatives; for if a man make a Lease for life to one, the remainder to his Executors for twenty one years, the term of years shall immediately vest in the Lessee; for even as Ancestors and Heirs are Correlatives as to Inheritance, so are Testators and Executors Correlatives as to Chattels: And therefore if a Lease for life be made to the Testator, the Remainder to his Executors for years, the Chattel shall vest in the Lessee himself, as well as if it had been limited to him and his Executors. And thus a Remainder of years limited to the Executors of a Lessee, shall presently vest in the person of the Lessee himself, because Testators and Executors are Correlatives as to Chattels.

C H A P. XVIII.

Of the Executors Right in opposition to the Heirs in reference to Mortgages.

1. *How the Executor doth more represent the person of the Testator, than the Heir doth the person of his Ancestor.*
2. *The difference in point of payment, whether to the Heir or to the Executor in Case of Mortgages.*

1. **I**F the Feoffee in Mortgage before the day of payment which should be made to him make his Executors and die, and his Heir entereth into the Land as he ought; in this Case the Feoffor ought to pay the money at the day appointed to the Executors, and not to the Heir of the Feoffee; unless the condition were, that the Feoffor pay to the Feoffee or to his Heirs such a sum of money at such a day. (a) Here note, That the Executors do more represent the person of the Testator than the Heir doth the person of the Ancestor; for though the Executor be not named, yet the Law appoints him to receive the money, but not so the Heir, unless he be named. (b) Here also note, That if the Condition upon the Mortgage be to pay the Mortgagee or his Heirs the money, and before the day of payment the Mortgagee dieth, the Feoffor cannot in this Case pay the money to the Executors of the Mortgagee. (c) But if the Condition be to pay the money to the Feoffee, his Heirs or Executors, then the Feoffor hath election to pay it either to the Heir or Executors. (d)

2. *If a man make a Feoffment in Fee, upon Condition, that the Feoffee*

(a) Littl. Inst.
lib. 3. cap. 5.
sect. 339.

(b) Coke, ibid.

(c) Ibid.

(d) Ibid.

Feoffee shall pay to the Feoffor, his Heirs or Assigns, Twenty pound at such a day, and before the day the Feoffor makes his Executors and dieth, the Feoffee may as aforesaid pay the same either to the Heir or to the Executors, for they are the Feoffors Assigns to this intent: But if a man make a Feoffment in Fee, upon Condition, that if the Feoffor pay to the Feoffee, his Heirs or Assigns, Twenty pounds before such a Feast, and before the Feast the Feoffee maketh his Executors and dieth, the Feoffor ought to pay the money to the Heir, and not to the Executors, for the Executors in this Case are no Assigns in Law. And the reason of this difference is, for that in the first Case the Law must of necessity find out Assigns, because there cannot be any Assignes in Deed, for the Feoffor hath but a bare Condition, and no Estate in the Land which he can assign over; but in the other Case the Feoffee hath an Estate in the Land, which he may Assign over: And where there may be Assignes in Deed, the Law shall never seek out or appoint Assignes in Law. (a)

C H A P. XIX.

Touching the Executors Election to accept or refuse the Executorship.

1. *Of the Judges Power to affix the time for that Election; or in Case of the Executors refusal what his Power is.*

2. *In what Case a person may be compell'd to accept the Executorship, notwithstanding his Judicial refusal.*

3. *How one appointed Executor by the Will may Administer, notwithstanding his refusal to Prove the same.*

4. **H**E that is appointed Executor in a Will, may be summoned to appear before the Judge of the Jurisdiction, to accept or refuse the Executorship. (a) The time wherein he that is named Executor in the Testament, is to deliberate and determine whether he will accept or refuse the Executorship, is uncertain, and left to the discretion of the Judge, who hath used at his pleasure, and when he will, not only within the year, but within a moneth or two to Cite him that is named Exegator to accept or refuse the Executorship; and upon the non-appearance or refusal of such Executor to Prove the Will, the Judge may commit Administration as in an Intestate. (b) And such Administrators Power is effectual in Law, untill the Executor undertake the Executorship. (c) For then the Judge may revoke such Administration.

(a) Coke, 8ld.

If all the Executors write a Letter to the Ordinar, desiring him to commit Administration, for that they cannot attend the Execution of the Executorship or the Will, it is such a refusal as that they cannot afterwards Administer. HILL, 31 Eliz. Benetown ver. Carter, Moor Rep. m. 426.

(c) Bole, Prior. & Bar. in C. Fua not. de Testa. & Plowd. in Cal. int. Greib. & Fox.

Legat in Libertatem de Execut. Testa. & lib. Jo. de Athon. Verbi approb. Conu.

(b) Brook Abr. sit. Admin. m. 31. & tit. Execut. m. 48. 193. B.

31 H. 8. cap. 51. (c) Bald. in L. de her. C. de Fidei Commis. & Plowd. in Cal. int. Greib. & Fox.

(4) Broo. Abrid.
tit. Admin. n. 33.

(c) Abridg. dez
Cas. tit. Admini-
strat. nu. 3. fo. 183.
(f) : 1 H. 8. c. 5.

(g) Panor. in C.
Jo. de Test. Ext.
nu. 3. & Oldend.
de Execut. ult.
vol. tit. 7. in fin.
(h) Plowd. in
Cas. inter Greib.
& Fox.

(i) Fitzh. Abrid.
tit. Execut. n. 35.
(k) Gribal. Thef.
Com. Opin. verb.
Tutor. & Rom.
Confil. 235.

(l) Ibidem.
(m) Auth. hoc
amplius. C. de
Fidei. Com. No-
vel. de heredi. &
Falcid. §. si quis
autem.

Cok. 9. 37. Fitzh.
tit. Admin. 611.
Bro. tit. Admin. 32.
Perk. Sect. 485.
Dyer, 160.
21 Ed. 23.

(n) Cood. lib. 5.
fol. 18.

(o) 22 Ed. 3. 19.
& 15 Ed. 3. 8.

(p) 41 Ed. 3. fol.
22. & 11 Ed. 4.
fol. 24.

(q) 42 El. Cok
9. fol. 36, 17.

(r) Bro. tit. Ex.
nu. 38. Dyer fol.
160.

(s) Bro. eod. tit.
nu. 37. & nu. 117.
Vid. Part. 1. cap.
20. §. 6.

Mich. 29. & 30
Eliz. C. B. Bro-
ker vers. Charter.
Cro. Rep. par. 3.

tion. (4) But if the Judge knowing that there is a Will, grant Administration, not having first called the Executor to accept or refuse the Executorship; the Executor when he shall have Proved the Will, may Sue such Administrator in an Action of Trespass; (5) Because the Judge hath no power to grant Administration but in Case of Intestacy, or that the persons named Executors either will not or cannot be Executors. (6) No man can be compell'd to accept the Executorship, (g) unless he hath already intermeddled with the Testators Goods as Executor; (h) for then it is too late for him to refuse. (i) Yet if any Legacy be given him in the Will, wherein he is named Executor, he may then be compelled to accept the Executorship, or he shall lose his Legacy. (k) Yea, though he were of Kin or Allied to the Testator. (l) Yet the Wife shall not lose her Thirds, nor the Children their Filial Portions by refusing the Executorship. (m)

3. Although where an Executor hath Administred, he cannot afterward refuse, because he hath thereby determined his Election; and although where there is an Executor and he refuse, or many and all refuse, the party is dead Intestate, and Administration is to be committed with the Will annexed; yet in case there be divers Executors, viz. A. B. C. and A. only refuse, and the Will be Proved by the other Two, there A. continueth an Executor, notwithstanding his refusal; (n) so as he may still release debts of the Testator, and debts owing by the Testator may be released to him. (o) Yea, if Sure be to be had by or against the Executors, it shall not be in the Names of B. and C. only, but A. also must be Named as a Plaintiff or Defendant, or else the Action may be overthrown. (p) Yea, this Executor which refused may afterwards Administer at his pleasure, and intermeddle with the Goods as well as the others; but after their death he cannot so do; (q) for then the Executor of him that Proved the Will is only to Administer; and the others refusal continuing to the death of his Co-Executor, his Power then died also with him; but so long as the one Co-Executor liveth that Proved the Will, the other, though he refused the Executorship before the Judge, may yet afterwards, so long as the other lives, Administer the Goods, or Remit the Debts due to the Testator; (r) And that Co-Executor that so Proved the Will, cannot hinder him, nor can he Recover against the persons by him so released. (s)

Trespas. It was found by Verdict, That Sir Ralph Rowlett being possess'd of a Term, made his Last Will, and thereof made the Lord Keeper Bacon, Catlin Chief Justice, and others his Executors, and Devised the Term to the Lord Catlin, and died. All the Executors wrote a Letter to Dr. Dale, Judge of the Prerogative

gative Court, That they could not intend the Execution of the Will, and desired him to commit the Administration to Henry Goodyer, the next Kin of the Testator; The Administration was accordingly granted, but the Register Entered the Cause, viz. For that the Executors did defer *suscipere onus Testamenti*. After this, Castlin Entered upon the Land Devised to him, and granted it over; the doubt was whether this Grant were good: 1. Whether the Letter were a sufficient Renunciation? 2. Whether (if they once refuse) they may, after Administration granted, Administer at their pleasure? Dr. Ford declared to the Justices, That by the Civil Law a Renouncing may be as well by matter in Fact, as by a Judicial Act, and they may refuse *per patet*, and Cited a Rule in the Civil Law, *Non vult esse heres, qui ad alium vult transferre hereditatem*; and *Hereditas est totum jus quod defunctus habuit*. And to the second matter he said, *Qui semel repudiaverit hereditatem, amplius hereditatem petere non potest*; and *Qui semel repudiaverit*, (shall not after be Executor, *quia transit in contrarium*. And that Executors cannot refuse for one time, but for ever; but they may pray time to Advise or Consider of taking upon them the Executorship, and it ought to be granted; and in that Case the Ordinary is to grant in the mean time *Letters ad Colligendum, &c.* but is not to grant Administration. And for these Reasons, there being a refusal, the Grant made after Administration committed, was void; and so was the Opinion of the Court.

C H A P. XX.

Touching what Acts may or may not be done by an Executor, as well before as after Probate of the Will.

1. *An Executor may before Probate of the Will enter into the house of the Heir to seize on the Testators Goods.*
2. *A limitation or qualification of that Power.*
3. *In what Case payments must be made by or to an Executor, though no Will yet Proved by him.*
4. *What Actions an Executor before Probate of the Will may or may not maintain.*
5. *An Executor may before Probate of the Will make an Inventory of the Testators Goods and Chattels.*
6. *Several other things which an Executor may do before he hath Proved the Will.*
7. *An Executor may retain the Testators Goods to satisfy his own Debt.*

THE Power of an Executor dependeth wholly upon the Will and designment of the Testator. Now an Executor may before his Proving of the Will, seize and take into his hands any of the Testators Goods; yea, enter into the house of the Heir, if not locked, so to do, and to take the Specialties of debts; and generally, he may do all things which to the Office of an Executor pertaineth, except only bringing of Actions and prosecution of Sutes; (a) for they cannot Sue till they have the Will under the Seal of the Probate-Office.

2. Although an Executor may after the Testators death enter into the house where he lived and died, and where his Goods are; and thence take them away even before Probate of the Testament, yet understand it with this caution, That he must do this within convenient and reasonable time, as within or about thirty dayes next after the Testators death; and that also in a due and peaceable manner when the doors are open. (b)

3. An Executor may also before Probate of the Will pay debts and receive debts, and make acquittances of debts owing to the Testator: Yea, if before such Proving of the Will the day be come for payment upon Bond made by or to the Testator, payment must be made by or to this Executor, though the Will be not yet Proved, and that upon like pain of forfeiture, as if the Will were Proved. (c) Also an Executor may before Probate give or sell any of the Goods and Chattels of the Testator not otherwise

(a) Offic. Ex. c.
2. §. 1. & 9 Ed.
3. fol. 32. 47. &
7 H. 4. 18.

(b) Littl. Sect.
29. Plowd. 281.
Bro. tit. Execut.
129.
(c) Offic. Ex. ubi
sup.
Coke 6. 18. 9. 38.
5. 27.
Plowd. 280.
9 Ed. 4. 47.
36 H. 6. 7. Fitzh.
tit. Admin. 2. 6.
& Brow. 1. part.
76. 77. 73. 53.

wife bequeathed in the Will, and for the same may maintain his Action.

4. For an Executor for Goods of the Testator taken from him, or for a Trespass done upon the Lease Lands, or for a distraining or impounding of the Goods or Cattel, may maintain Actions of Trespass or Replevin or Detinue even before the Will be Proved, because these Actions arise out of the Executors own possession.

(d) But an Action of Debt or the like contracted by the Testator he cannot maintain before the Will be Proved, for therein he must shew forth the Will Proved under the Court-Seal. And as at the Common Law, If a man be bound to another in a certain sum of money to pay at a certain day, and the Obligee before the said day Release unto the Obligor all Actions, he is barred of the duty for ever, though he could not have an Action at the time of the Release made; even so may an Executor before Probate of the Testament Release an Action. (e) And the Reason of both is, because the right of Action is in them, for that the Debt is a thing consisting merely in Action; and therefore though no Action as yet then lieth for the Debt, yet because the Right of Action is in them, the Release of all Actions is a discharge of the Debt it self.

5. Another thing that an Executor may do before the Proving of the Will, and which is expedient for him, though as yet not so necessary, is the making of an Inventory; for the Executor had need be cautious that he do not intermeddle with, or Administer the Testators Goods until he hath made an Inventory; for although the Act of an Executor is said to hold in Law before the Proving of the Will, (f) and the making of an Inventory; (g) yet for intermeddling with the Testators goods as Executor before he hath made an Inventory, or caused the same to be made, though not exhibited, he was according to Law punishable; (h) unless it were for doing such things as could not conveniently be deferred till the Inventory were made, as concerning things relating to the Funerals, or disposing such things as *Servando servari non possunt*, and such like. (i) Besides, if he make not an Inventory and yet Administer, he may be compelled to discharge out of his own purse more Debts and Legacies than happily the Testators Goods and Chattels did amount to.

6. There are several other things which an Executor may do before he hath Proved the Will; and he may also keep any of the Goods of the Testator, so as he pay out of his own money the value thereof in Administration of the Testators Estate; (k) he may also if he want money to pay Funerals, or discharge Debts, sell any of the Chattels Real or Personal, whereof the Testator died possessed, yea, though that thing were particularly bequeath-

(d) Dyer in Plowd. Com. 127. *Case of Greisbr. & Fox.*

(e) Trin. 2 Jac. in Com. Ban. inter Middleton & Kinnor. 18 H. 6. 23. b. Pl. Com. 277, 278. in *Greisbrook Case*, per Wylson. vid. Coke, lib. 3. cap. 8. Sect. 512.

(f) Plowd. in *Case*. inter *Greisbrook & Fox.*

(g) *Lynwood* in C. Statut. 6. in *inventarium. tit. de Testa. lib. 2.*

Const. Prov. Cant. verb. prius. (h) *Legat* in *Libertatem de Executor. Testam.*

(i) Jo. de Atbo. in dict. *Legat* in *Libertatem. verb. inventarium. dict. C. Statut. 6. inhibemus. in Text. & in Gloss.*

(k) Dyer 200.

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ed. As if a man be possessed of a Term of years, and bequeath the same to A. B. the Executor may notwithstanding the bequest at any time before his Assent given to the Legacy, if he have not Assets sufficient to pay the Debts, sell this Term of years, and the Legatee is remediless. So also he may do, although there be Assets enough besides to pay the Debts; but in such Case the Legatee may not be without all relief in a Court of Equity against the Executor as to Damages; but the Sale is unavoidable. (1)

(1) Plowd. 343,
344.

Lessee for years Devised his Term to one whom he made his Executor, and died: The Devisee entered before any Probate of the Will, and held and enjoyed the Land for a year and more, without Proving of the Will, and then died; it was a Question, whether his Executor, or in Case he died Intestate, his Administrator should have the Term? It was the Opinion of the Court, That the Term was lawfully settled in the Executor by his Entry; and it was a good Execution of the Devise, without any Probate made of the Will. *Mich. 22 Eliz. Dyer, 367.*

*Mich. 1652. B.R.
Long & Hobbs
Case, Stiles 341.*

Letters of Administration do relate to the time of the death of the Intestate, and not to the time of the granting of them; and therefore an Administrator may have an Action of Trespass, or a Trover and Conversion for Goods, taken by one before the Letters granted to him; otherwise there would be no Remedy of the wrong done.

*Passh. 42 Eliz.
Anderl. Rep. par.
2. Case, 83.*

Executors took the Testators Goods before they had Proved the Will; another took Letters of Administration, and takes the Goods out of the Executors hands before the Will was Proved: The Executors bring their Action of Trespass against him who took the Goods; the Court held that it did well lie; for after the Testators death the Goods belong to the Executors, and to none other; and an Administration to intermeddle with these Goods is utterly void; for that they have nothing to do with those Goods as Administrator when there is an Executor.

(m) Plow. Con.
184.

7. An Executor may retain Goods in satisfaction of a Debt due to him from the Testator, and the Retainer shall be held good. (m) Action of Debt was brought against the Executors of A. B. who pleaded that they had fully Administred; the Plaintiff gave Evidence that they had Goods in their hands; the Defendant shewed, that the Goods were pledged by their Testator, and that they had Redeemed them with their own money to the full value; and that for the rest of the Goods, that they had paid to the Testator as much for them as they were worth: It was holden, That the same did well maintain their Issue of Fully Administred; for that an Executor shall by way of Retainer be recompenced that which he hath paid. (n) But an Executor of his own wrong cannot retain Goods, but they shall be Assets in his

(n) 6 H. 8. Dyer
2. 20 H. 7. Kell-
way 58.

his

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his hands. (o) The like we have in another Case. Two men were possessed of Goods as Executors; the one of them took the goods into his hands, and disposed of divers summs of money *in pios usus, & pro anima Testatoris*, which summs did amount to more than the Goods of the Testator were worth; and he did retain the Testators Goods as his own proper goods, converting the same to his own use, whereof he died possessed, after he had made his Will, and therein Executors. The surviving Executor brought *Devinne* of the said Goods against the Executor to the value of One hundred pound, upon which the Defendant pleaded the matter *Supra*. It was adjudged, That the Retainer was Lawfull; and that those Goods now in the hands of the Executors, were not Assets or Goods of the first Testator in the Executors hands. (p) Or suppose a Testator be indebted to a man by Bond in Twenty pound, if his Executors make a sufficient Obligation to the Testators Creditor, and sufficiently discharge the Testator, without fraud or covin, they may retain the Goods for so much, and the Goods retained shall not be Assets in their hands, yea, though they have appointed *ulteriore diem* for the payment of the money. (q)

(o) Co. 5. part.
30. *Conitors Case*.

(p) Mich. 2 Ellz.
Dyer, 187.

(q) Pasch. 30 El.
in C. B. Stamp
& Huichins Case.
Leon. 111, 112.

Shelley ver.
Sackville. Andert.
Rep. par. 1. Case
50. vid. 20 H. 7.
Esp. 2. 4, 5.
M. 6 E. 6.

S. Brought Debt against S. as Executor to B. who pleaded *fully Administred, &c.* to which the Plaintiff replied, That he had Goods of the Testators to the value of Two hundred Marks, which the other confess'd and gave in Evidence, that he had paid as much of his own proper money for the Testators Debts, and shew'd how; the Judges doubted whether he could give the matter in Evidence, and desired the Opinion of the Justices of B. R. thereon, who held, That he might give it in Evidence; whereupon the Justices proceeded accordingly: For it was agreed, *Hill. 10 H. 8.* That the property of the deceaseds Goods by payment of the Testators Debts to the value of the said Goods, retained to the amount in value, was altered, and the property being altered to the use of the deceased, is a just Administration.

CHAP. XXI.

Of Inventories.

1. *Within what time an Inventory is to be made and exhibited.*
2. *The manner how, and reason why an Inventory is to be made.*
3. *What ought to be inserted into the Inventory, and what not.*

1. **T**He time appointed for the making of an Inventory, and for exhibiting the same, is left to the discretion of the Judge, (a) which

(a) Text. in C.
Statut. 9. Inven-
tarium, tit. de
Testa. lib. 2.
Prov. Const.
(b) Lynn. in C.
Statut. verb. Ar-
bitrio.

(c) Casal. verb.
Inventarium.

(g) Fulb. Paral.
2. part. 3. Diol.
fol. 32.

(e) Fran. Porcel.
in Tract. de In-
ventario. q. 2. §.
Sancimus. De
Hered. & Fall. in
Auth.

(f) 21 H. 8. cap. 5.

(g) Terms of
Law, verb. Chat-
tels, quæ sunt
Cat. Re.

(h) Perk. tit.
Devise, fol. 99.

(i) Perk. ibid.

(k) Coke Rep.
lib. 4. in Herla-
gendens Case in
fin. fol. 63, 64.

(l) Kelw. Rep.
fol. 88. nu. 2.
Labridg. dez Caf.
sq. Exec. fol. 181.

(m) Ibidem.

(a) which he is to regulate according to the circumstances of Place, Person, Goods, &c. (b) yet Regularly the Inventory ought to be begun by the Executor within Thirty dayes next after the Testators death, or his notice of being made Executor, and to be finished within Thirty dayes more after that, or within a year, if the Goods be remote, else he may be charged for the whole debt. (c)

2. The Executor in making of an Inventory ought to call Two at least of the Testators Creditors or Legataries, or upon their refusal or absence Two other honest persons, and in their presence shall make a true and perfect Inventory of all the Testators Goods, Chattels and Credits; and the same shall be indented, whereof one part shall be by the said Executor upon his Oath for the Truth thereof left in the Registry of the Court, the other part to remain with himself. In which Inventory the Testators Goods and Chattels are particularly to be valued and apprayzed at their true and just value. And all such Goods and Chattels as are contained in the Inventory are presumed to have belonged to the Testator, and now to the Executor, and no more. Therefore if a Creditor or Legatary affirm, that the Testator had at his death more Goods than are comprised in the Inventory, he must prove the same; for such an Inventory by the Civil Law cannot be disproved, unless the number of the Witnesses be twice as many in number as they which do Prove it; (d) And if the Executors or Administrators do make a True Inventory, they shall not be charged further with any Debts than the Goods of the Testator or Intestate will extend. But if the Executor Enter upon the Testators Goods without making an Inventory, then the Presumption of Law will be against the Executor, that he had Goods sufficient, not only to pay the Debts, but all the Legacies also: So that the Reason is evident wherefore an Inventory is to be made, viz. lest the Executor if otherwise than honestly disposed, should defraud the Creditors or Legataries by concealing the Testators Goods. (e)

3. Generally all the Goods and Chattels whereof the Testator died rightly possessed (some certain things for special Reasons and Legal reservations only excepted) ought to be put into the Inventory; (f) And therefore Leases are not exempted: (g) Also Corn growing on the ground is to be put into the Inventory, because it belongs to the Executor: (h) But not Grass or Trees so growing, which belongs to the Heir; (i) Nor Glass-windows, nor Waincot; (k) Nor Tables Dormant, nor Mangers, nor any thing affixed any way to the Freehold; (l) Nor the Box or Chest containing the Evidences of the Land; nor Doors, Locks or Keys, nor Fishes in the Pond; nor Doves in Dove-houses situate in Lands belonging to the Heir; (m) Nor *Bona Paraphernalia*, that

is,

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is, the Wives convenient Apparel suitable to her Degree; (*n*) For as they are not to be put into the Inventory of her Husbands Goods, so neither are they liable to the payment of his Debts; (*o*) But the Wives Jewels, Chains, and Borders, and other Rich Ornaments of her Person are to be put into the Inventory of her deceased Husbands Goods. (*p*) Also Debts due to the Testator are to be put into the Inventory: (*q*) But Monies raised upon Lands given by the Testator for the payment of Debts or Legacies are not to be inserted into the Inventory. (*r*) Likewise all House-hold-stuff is to be put into the Inventory: under which word are comprized Tables, Stools, Forms, Chairs, Carpets, Hangings, Beds, Bedding, Linnen, Bason with Ewers, Candlesticks, with all sorts of Domestick Vessels, whether of Earth, Wood, Glasse, Brasse or Pewter; yea, Apparel, Books, Weapons, Tools, Cattel of all kind, Victuals, Corn, and Grain of all Sorts, Waynes, Carts, Plowgeare, Coaches; (though no House-hold-stuff) also Plate and Jewels; and generally all things not affixed to the Free-hold, but coming to the Executor and not descending to the Heir, are to be Inventaried; but such things as are affixed to, and so become part and parcel of the Free-hold, and all things that descend to the Heir, and come not to the Executor, are to be exempted out of the Inventory.

The Lady *C.* was possessed of divers Leases, and conveyed them in Trust, and afterwards married with *A. B.* the Lady received the money upon the Leases, and with part of the money she bought Jewels, and other part of the money she left, and died; *A. B.* took Letters of Administration of the Goods of his Wife, and in a Sute in the Ecclesiastical Court, the Court would have compelled him to have given an account of the Jewels, and for the Money, to have put them into the Inventory; but the Opinion of the whole Court of *B. R.* was, That he should not put them into the Inventory; because the property of the Jewels was absolutely in him as Husband, and he had them not as Administrator; but of such things as be in Action, as he shall have as Administrator, he shall be accountable for, and they shall be put into the Inventory: And for the Monies received upon Trust, it was resolved, that the same was the Monies of the Trustees, and the Wife had no remedy for it, but in Equity, and therefore the Husband should have it as Administrator; And in that Case it was Resolved, That if a Woman do convey a Lease in Trust for her use, and afterwards marrieth, That in such Case it lies not in the power of the Husband to dispose of it: And if the Wife die, the Husband shall not have it, but the Executor of the Wife. (*r*)

(*n*) *l. hac lege, & l. fin. C. de pact. conven. sup. Dot.*
(*o*) *l. ob maritorum. Cod. Ne uxor pro marito.*

(*p*) *dist. Stat. 21 H. 8. c. 5.*
(*q*) *Glof. in l. Chirographus. ff. de Adm. Tutor. (r) St. H. 8. ubi supra.*

(*r*) *Trin. 17 Char. in B. R. Sir John St. John's Case.*

C H A P. XXII.

Of Actions maintainable by Executors or Administrators.

1. The several kinds of Actions maintainable by Executors.
2. An Action Personal in the Testator is none in the Executor.
3. An Executor may sue for Rents and the Arrerages thereof, yea, in some Case where the Testator himself could not.
4. An Executor Out-Lawed or Attainted may yet have Action.
5. In what Case one Co-Executor may Sue another.
6. In what Court Executors ought to Sue.
7. Cases in Law touching this Subject.

1. **R**egularly Executors may Charge all others for any Debt or Duty due to the Testator, as the Testator himself might have done; and the same Actions that the Testator himself might have had; the same for the most part may Executors have also: (a) And therefore Executors may have Actions of Account, Actions of Trespass *de bonis asportatis in vita Testatoris*, Actions of Debt against Goalers upon escape of Prisoners, Writs of Error upon the Statute of 27 Eliz. Attaints upon the Stat. of 23 H. 8. Writs of Restitution upon the Stat. of 21 H. 8. An *Indemnitate Nominis* when the Testators Goods are taken upon an Out-Lawry against another man of his Name; Actions of Covenant; for breach of a Covenant made to the Testator; Action upon the Case upon the *Trover* and *Conversion* of the Testators Goods; an *Ejectione firma* for an Ejectment of the Testator out of a Term; an Action of Debt for Rent behind in the Testators life-time; also an Action of Debt for the Arrerages of an Annuity due to the Testator in his life. (b) Likewise an Executor for Goods taken from him that belonged to the Testator, or for a Trespass done upon the Lease-Lands, or a distraining or an impownding of Goods or Cattel, may maintain Actions of Trespass, or Replevin, or Detinue, even before the Will be Proved. (c) Likewise, &c.

2. But an Executor shall not have an Action for a Personal wrong done to the Testator, when the wrong done to his Person, or that which is his, is of that nature as for which Damgages only are to be Recovered; and therefore an Executor can bring no Action for the beating or wounding the Testator, or for a Trespass done to him in his Cattle, Grass, or Corn, or for a Wast by his Tenant done in his Lands; for all these are but Personal Actions, and die with the Testators person. (d)

3. If one grant a Rent out of his Land for life, Provided that

(a) Sheph. Epit.
cap. 115.

(b) March. 329.
33. Pl. 13.
Plowd. 181. Coke
21. 90.
West. 2. cap. 22.
F. N. B. 117. Dyer
222. Coke 11. 41.
& 6. 80. & 9. 85.
St. 9 H. 6. cap. 4.
Broo. tit. Exec.
161. Coke 5. 27.
St. 7 H. 4. c. 6.
Coke 4. 50. Broo.
211. Exec. 169. &
222. Coke 9. 85.
Action. Dyer
244. 322. 69. St.
22 H. 8. cap. 10. &
Brownl. 1. par.
101.

(c) Dyer, in Pl.
Com. 201. Case
of Greisbrook and
Fox.

(d) Sheph. Eg.
sup.

it shall not charge his Person, and the Rent be behind, and the Grantee dieth; in this Case the Grantees Executor may have an Action of Debt for those Arrerages. (e) Likewise if any Rent or Arrerages of Rent be due to one upon a Grant of Rent out of any Land to him, or reservation of Rent upon any Estate made by him of Land; in these Cases his Executor may have an Action of Debt for this Rent, or he may distrain for it so long as the Land chargeable with the Rent, and out of which it doth issue, is in his possession that ought to pay it, or any claiming by or under him. (f) Yea, an Executor in some Cases may have his remedy by Action for the Arrerages of Rent which the Testator himself in his life-time could not; for if a man grant a Rent-charge out of certain Lands to another for life with a *Proviso* in the Deed, that the Grantee shall not in any sort charge the Person of the Grantor generally, and the Rent be behind, the Grantee dieth, the Executors of the Grantee shall have an Action of Debt against the Grantor, and charge his person for the Arrerages in the life of the Grantee, notwithstanding that *Proviso*; because the Executors have no other remedy against the Grantor for the Arrerages; for Distrain they cannot, because the Estate in the Rent is determined; and the *Proviso* cannot leave the Executors without remedy; (g) so that the word [*Proviso*] in this Case doth work only a qualification or limitation, not a Condition or a Covenant.

4. One that is Out-Lawed or Attainted in his own person, may yet Sue as Executor, because his Suit is in anothers right, viz. the Testators. (h) But he that is Excommunicate cannot proceed in Suite as Executor; yet this Excommunication pleaded doth not abate or overthrow the Suite, but makes that the Defendant may stay from answering his Suite, until the Plaintiff be absolved and discharged from his Excommunication. (i)

5. Although one Co-Executor cannot Sue another for possession of the Testators Goods; for that many Executors to the same Testator are but as one man, and no man can Sue himself; (k) So that when the Testator doth make divers Executors, if any one of them doth get the Goods, or the possession of the Goods of the Testator, the other Executor hath no Action for recovery of the same Goods; or any part thereof; for the said Reason that one Co-Executor cannot Sue another; nevertheless, if the Testator make divers Executors, and do bequeath to the one of them the residue of his Goods, it is not only lawful for him to whom they are bequeathed to retain the same, but also if the other Executor enter thereunto, he is subject to an Action of Trespas. (l) Also if the Executor of a Co-Executor have any Goods belonging to the first Testator, the other surviving Co-Executor of the first Testator may have an Action against the Executor of that deceased Co-Executor

(e) Cok. sup.
Littl. 346.

(f) Cok. 4. 50. &
32 M. 8. c. 37.

Note, that in all
Cases and Actions
brought by Execu-
tors as Executors,
like this shall be
in the Detinet
tantum, although
the duty doth ac-
crue in his own
time; because the
thing recovered
shall be Affert.

And so it was ad-
judged. Patch. 7
Jac. in B. R. in
the Lord Rich
and Franks Case,
& 43 Eliz. in B.
R. in Sparks Case,
(g) 6 Eliz. Dyer,
127. & Cok. sup.
Littl. 1. 2. c. 12.
Sect. 250.

(h) 21 H. 6. 30.
& 21 H. 4. 49. 69.
& 42 Ed. 3. 13.
14 H. 6. 14. 15.
(i) 3 H. 6. 40.
Littl. 44. Cok. 8.
69. 11 R. 2.
Excom. 25.

(k) Broo. tit.
Exec. n. 98. &
argum. c. de bitu-
de Baptis. Extr.
& l. preter. ff. de
Tur. & Cur. dat.
& Fitzh. tit. Exe.
nu. 32.

(l) Broo. eod.
tit. n. 104.

(m) Broon. tit.
Exec. nu. 99.

(n) 36 H. 6. cap.
7. Cok. 2. 135.

(o) St. 2 R. 3.
c. 17.

(p) T. 4 H. 3. re-
ferente Fitzh. tit.
Prohibit.

(q) 32 H. 8. c. 37.

Pasch. 1 Eliz. B.
R. Real. Rep.
Hugh. Abr. tit.
Execut. acc. 2.

Anderl. Rep. par.
1. Case 49. C. B.
vid. 2 R. 3. fol. 8.
20 E. 3. fol. 26.
H. 8. fol. 7. H. 28
H. 8. inter Levett
& Lewkner.

Mich. 15, 16 El.
C. B. Hunk &
Alberoughs Case.
Anderl. Rep. Cal.
45.

Co-Executor for the same. (m) Also if there be Two Administrations granted together, he that is the rightful Executor or Administrator may Sue the wrongful Administrator for the Goods in his custody. (n)

6. Executors may not Sue for the Goods of their Testators in the Court Ecclesiastical, but at the Common Law. (o) Yet in some Cases an Executor may Sue in the Ecclesiastical Court, as touching his Testators Goods; as when a man bequeathes Corn growing, or Goods unto one, and a stranger will not suffer the Executor to perform the Testament; for this Legacy he may Sue the Stranger in the Ecclesiastical Court. (p) But if a man take from an Executor Goods bequeathed, for this the Executor must Sue his Action of Trespass, and not Sue in the Ecclesiastical Court, (q) Also Tenants may be Sued but at the Common Law by Executors or Administrators for Rents behind, and due to the Testator in his life-time, or at the time of his death, and may for the same distrain the Land charged with the Rent.

7. A Woman and another person were made Executors, the Woman took Husband, who did not alter the property of the Goods of the Testator, and then the Wife died, it was adjudged, That the other Executor might have an Action of *Detinue* against the Husband for the same Goods.

Debt brought by an Executor as due to his Testator, and Judgment given for him, but before Execution the Plaintiff died Intestate, and the Ordinary committed Administration of the Goods of the first Testator to another, who Sued out a *Scire Facias* on the Judgement. All the Justices agreed, That the *Scire Facias* did not lye, For that when the Executor died Intestate, the Testator was dead Intestate also, whereby the Judgement and Recovery was void.

Detinue brought by an Executrix against her own Husbands Executor; the Case was this, One *Falconer*, who was the Plaintiffs first Husband, made his Will, gave divers Legacies, and towards the end of his said Will, said, [The Residue of all my Goods I Give and Bequeath to *Frances* my Wife, whom I make my full and whole Executrix of this my Last Will and Testament, to dispose for the wealth of my Soul, and to pay my Debts] and died indebted to divers persons, to whom the said *Frances* paid the said Debts, and all the Legacies, having then Goods in her hand, for which this Action was now brought, she having after married one *John Hunk* who made the Defendant his Executor, to whose hands the said Goods came: Whereupon the Court demurred, and Judgement was, that the Plaintiff should recover; for notwithstanding the Devise, viz. of the Residue (as aforesaid) she hath them not as a Devisee but as Executrix, because the words of the Devise

Devise can have no other intendment than that she should enjoy them as Executrix.

Debt brought by the Executrix of *J. T.* against *W. B.* The Case was this; The said *W. B.* caused a Writing to be made and sealed; which he delivered to *V. C.* to deliver to *J. T.* as his Act and Deed: Accordingly the said *V. C.* offered the same to the said *J. T.* as the Act and Deed of the said *W. B.* But he utterly refused to receive the same as such; notwithstanding which, the said *V. C.* there left the said writing; which matter the Defendant pleaded, and said it was none of his Act; whereupon was a demur, and Judgement given for the Plaintiff.

Anders. Rep. par. 1. Case 8. inter Tam and Bars, vid. Dy. 1 Eliz. and Whelpdales Case. 5. Rep. fol. 119. E. cont. H. 1 Eliz. Rot. 492.

Debt upon an Obligation Conditioned; That if the Defendant in *Michael.* Term then next ensuing, in the Prerogative Court of the Arch-Bishop of *Canterbury* at *London*, should give to *D.* his Executors or Administrators such a Release and Discharge from and against him and his Children for the receipt of One Hundred Marks, as by the Judge of the Court should be thought meet, That then &c. The Defendant pleaded, that the same Term one *S.* was Judge there, and that the said Judge did not Devise or Appoint any Release or Discharge, &c. And it was thereupon demurred, and adjudged to be no Plea: For that it is not alledged that he caused a Release to be drawn and tendered to the Judge to be allowed: for it is on his part in discharge of his Obligation, to draw such a Release as the Judge should allow: Wherefore it was adjudged for the Plaintiff. *5. Co. 23. b. Mich. 43, 44. C. B. Pl. 42.*

Trin. 41 Eliz. Lamb. Executrix of Drables ver. Brownmont.

Debt as Administrator to *B.* upon an Obligation: The Defendant pleaded, That the Plaintiff was an *Alien*, under the Obedience of *Philip* King of *Spain*, Enemies to our Sovereign the Queen, and demands Judgement, whether he should be Answered; and it was demurred thereupon, and adjudged that he should Answer.

Passh. 41 Eliz. Brocks ver. Phillips. Cro. Rep. par. 3.

Assumpsit: By an Executor of a Promise made to his Testator: The Defendant pleads *non Assumpsit*, and found for the Plaintiff, and Judgement for him. And Errour was thereof brought, and Assigned, because he did not shew in Court the Testament in the Declaration mentioned: Whereunto it was said, That it was but default of Form, which is aided after Verdict; but all the Court held it to be matter of substance; for otherwise he doth not entitle himself to the Action, without shewing the Testament. For which cause it was Reversed.

Mi. h. 38, & 39 Eliz. B. R. Edwards ver. Stapleton. Cro. Rep. par. 3. Pl. 1.

Debt upon a Special Verdict; the Case was: A Parson made a Lease for years, rendering Rent at *Michaelmas*, or within a moneth next after; The Lessee Enters; the Lessor dies within ten dayes after *Michaelmas*: Whether his Executor hath any remedy for this Rent, was the Question, and Ruled that he had not; for the

Trin. 39 Eliz. C. B. Case Pilkington ver. Dal on Cro. Rep. par. 3. Pl. 12.

Rent.

Rent was not due in the Testators time, nor until the end of the moneth. And in such Case it hath been adjudged, that such Rent belongs to the Heir, where it is reserved by a Lay-person, and he dies after *Michaelmas*, and before the moneth ended. Wherefore it was adjudged accordingly. *vid.* 10. Co. 129.

Action brought by an Administrator for Rent reserved upon a Lease for years by the Intestate; and for Rent arrear in his time the Action was brought; and he shews how Administration was committed by the Arch-Bishop; but doth not say, *Quod profertur hic in curia Literas Administrationis*; The Defendant pleaded, and found for the Plaintiff. And it was moved in Arrest of Judgement, That the not shewing the Letters of Administration was matter of Substance, which made the Declaration vicious, and not aided by the Statute of 18 Eliz. or 32 H. 8. by the Verdicts; for that enables the Plaintiff to his Action, and the omission thereof takes from the Defendant the advantage which he might have by demanding *Oyer* thereof; and *&c.* The Court resolved, That it was a matter of Substance, which ought to be shewn by the Plaintiff to enable him to his Action: And the Defendant shall have advantage thereof at any time; wherefore it was adjudged for the Defendant. *Vid.* 28 H. 6. 31. 16 Ed. 4. 8. 21 H. 6. 23. *Plowd.* 52.

Mich. 14 Jac. B.
R. Sir John Cuitts
vers. Bennet. Cro.
Rep. 2. par. Pl. 9.

Paskh. 10 Jac. B.
R. Browning vers.
Fuller. Cro. Rep.
par. 2. Pl. 1.

Errour in a Judgment in C. B. The Errour Assigned; for that in *Assumpsit* brought as Executor, although he shews himself to be Executor to him to whom the Promise was made, yet he saith not, *Testamentum hic in Curia prolatum*. The Defendant pleaded *non Assumpsit*, and found against him, and Judgement accordingly: And this being assigned for Errour, was held to be matter of Substance, and not of form only; and was therefore Reversed.

Mich. 7 Jac. B.
R. Haywarth
vers. David. Cro.
Par. 2. Pl. 6.

An Executor brings Debt upon an Obligation: The Defendant pleads, *non est Factum*, and found for him. And now the Question was, whether the Plaintiff should pay Costs upon the New Statute of 4 Jac. which exacts, That in every Action where the Verdict passeth for the Defendant the Plaintiff should pay Costs: but it was resolved, That this Case is not within the intent of the Statute, he being in anothers right, and of matter which lay not in his cognizance; therefore the Law never intended to give Costs against him. And so it is upon the Statute of 8 Eliz. where Costs be given in case the Plaintiff is Non-sued: As it was ruled in one *Fords* Case, and so it was Ruled here. And although *Manne* said, Costs had been allowed in the like Cases, they appointed, that henceforth it should no more be so.

Paskh. 27 Eliz.
Int. Hareh &
Fauconge. Moo.
Rep. nu. 326.

It was held, That an Administrator shall have Trespass *de bonis asportatis in vita Intestati* by the equity of the Statute of 4 Ed. 3. And an Executors Executor by the Stat. of 25 E. 3.

On a *Scire Facias* the Case was this, *Goth* was in debt to one *Couper* who died Intestate; his Wife took Administration, and brought Debt, and had Judgement to recover, and died Intestate; *Yate* the Plaintiff took Administration of the Goods of *Couper non Administrat.* and brought *Scire Facias* to have Execution on the Judgement: But it was adjudged, that it doth not lie for want of Privy; but it is clear, that he may have a new Action of Debt. And by *Popham* and *Telverton*, if an Administrator recover Damages on Trespass *de bonis asportatis in vita Testatoris*, and then dye Intestate, his Administrator shall have Execution thereon; otherwise of a Debt recovered which was due to the Intestate.

Mich. 41, & 45
Eliz. B. R. *Yate*
vers. *Gorb.* Moo.
Rep. nu. 931.

Tenant in Dower makes a Lease for years reserving Rent, and takes a Husband; the Rent is in arrear, the Husband dies; and it was agreed by the whole Court, That his Executors shall have the Rent.

Mich. 3 Ed. 6.
Moo. Rep. nu. 25.

If *A.* make a Promise to *B.* and after *B.* die Intestate; and Administration of his Goods be committed to *C.* who after dies also Intestate, and after Administration is committed to *D.* of the Goods of *C.* In this Case *D.* cannot have an Action on the Promise made to *B.* as Administrator to *C.* For he is not Administrator to *B.* in that Administration was not granted to him of the Goods of *B.* unadministred by *C.*

Mich. 15 Char.
B. R. Int. *Gessyn*
& *Osburn* per *Cu-*
riam. Rolls Abr.
tit. Execut. lit. c.

CHAP. XXIII.

Of Actions maintainable against Executors or Administrators.

1. Executors lyable to be sued by Creditors, though their Testators Goods not actually possessed by them, or imbeziled from them.
2. What kind of Servants wages Executors are lyable to pay and discharge.
3. How Executors are lyable in Case of breach of Covenant by their Testator in his life-time.
4. In what Case an Executor may be lyable to pay his Testators Debt out of his, the Executors own proper money.
5. Several other Cases wherein Executors are lyable to be sued.
6. Certain Cases wherein Executors are not lyable.
7. Several Law-Cases touching Actions against Executors and Administrators.

1. **A**lthough the Executor hath not actually and particularly laid his hands upon any of the Testators Goods, yet shall he

he be said to be in possession of them, so as to stand lyable to the Creditors, so far as they extend in value, though afterwards others do purloine or imbeizil them. (a)

(a) *Offic. Exec.*
cap. 10.

2. Executors are lyable for the payment of the wages of the Testators Servants retain'd in Husbandry and the like, but not for the wages of Waiters or Serving-men; the reason of the difference is because of the Statute compelling the one, not the other to serve. (b) Yet for them also an Action did lie against the Testator himself because of his Covenant.

(b) 4 H. 6. 16.

3. Where a breach of Covenant happens in the Testators life-time the Executor stands chargeable; Therefore if one make a Lease of Land by Deed, wherein he hath nothing, and die before an Action of Covenant be brought against him, it will be maintainable against his Executor, though no expresse Covenant. (c) Also if a Lessee for years Covenants to repair the Buildings, or to pay the Quit-Rents issuing out of the Lands Lett, the Executor to whom the Term cometh must as well as his Testator perform that Covenant, although he did not Covenant for him and his Executors. (d) Likewise if one be Lessee for years, or for life, without any Indenture or Deed, as he may be, (e) and his Rent being behind dieth; In this Case his Executor shall be lyable to the payment of this Rent, though without any specialty: But if the Lessee for years sell or grant away his Term or Lease and die, his Executor shall not be charged for any Rent due after the death of his Testator, though himself in his life-time was still lyable for the Rent to grow due after, until the Lessor accept the Assignee for his Tenant: (f) So that if a Lease for years be made rendring Rent, and the Rent be behind and the Lessee die, his Executor shall be charged for this Rent; or if the Lessee for years Assign over his Interest and die, his Executor shall be charged with the Arrerages before the Assignment, but not with any of the Arrerages due after the Assignment. (g) Also an Executor is chargeable for Tythes due from the deceased. (h)

(c) *Nake & An-*
wer's Case.

(d) *Offic. Exec.*
cap. 11.

(e) 21 H. 6. 1.
44 Ed. 3. 42.

(f) 44 Ed. 3. 5.
7 Ed. 3. 11.
14 H. 7. 4. Dyce
247.

(g) *Bron. Exec.*
127. & Cok. 3.
21. 22.

(h) *Trin. 7 Jac.*
E.R. F. N. B. 51.

4. If an Executor Sued, do plead that he never was Executor, nor Administred as Executor (for that must be added) then if Issue be taken upon this Plea, and it be found against him, the Plaintiff shall have Judgement to Recover not Damgages only, but the Debt it self out of the proper Goods of the Executor, if none of the Testators can be found. Likewise, as it is frequent in use for Executors to pay the Testators Debt with their own monies, and to make themselves satisfaction out of the Testators Goods: So it is most equal, that Executors should with their own money discharge the Arrerages of Rent of those Leases, the Profits whereof themselves enjoy by vertue of the Testators Will: Therefore where an Executor is sued for Rent behind, after the Testators

Testators death; upon a Lease for years made to the Testator, and by him left to the Executor, here it shall be adjudged and levied upon the Executors own Goods; for that so much of the profits as the Rent amounted unto, shall be accounted as his own Goods, and not his Testators. Again, if Executors plead *Plene Administra*, and it be found for them, and after that certain Goods of the Testator come to their hands; in this Case, if he which brought the first Action of Debt, bring the same against them again, the Action is well maintainable. (i) It is also to be remembred, That the value upon an Appreyment in an Inventory is not binding, nor much to be regarded at the Common Law either for or against Executors, for if it be too high it shall not prejudice the Executor, if it be too low it shall not advantage him; but the very true value as shall be found by the Jury when it comes in question, whether the Executor hath fully Administred, or hath Afficts in his hands, or not, is that which is binding in the Law.

5. Executors are lyable to satisfie the Obligations made by their Testators, though they be not therein bound by Name. Also an Action of the Case lyeth against an Executor upon an *Assumpsit*, or the simple contract of the Testator, especially where the ground of the *Assumpsit* is a true and real debt. Also the *Rationabilis pars bonorum* by Custome in some places is maintainable for the Widow and Children against the Executors. (k) Also a *Detinue* lyeth against him for the Goods delivered to the deceased, if the Executor doth still continue the possession of them. Likewise an Action lyeth against the Executor for arrerages of account found upon the deceased before Auditors. (l) Also the Executor of a man that recovereth a Debt upon a Judgement had by the deceased, shall be chargeable with restitution, if the Judgement be reversed for Error. (m) Also where a Prisoner dyeth in debt to a Goaler for his diet during the time of his imprisonment, his Executor is lyable. (n) Likewise where one hath a Tally of the Exchequer, to receive money of some Customer, Receiver, or other Officer of the Kings, and delivereth it to him, he then having money of the Kings in his hands; if he dye without paying the same, his Executor shall stand chargeable with the payment thereof. (o) Also the Executors of an Administrator are chargeable, where he did neither pay the Debts, nor leave the Goods of the Intestate to the next Administrator, but otherwise disposed of them: Yet an Executor is not chargeable in an Action of *Detinue*, nor of Account (except to the King) for the Testators detaining, and not paying, or answering things received, or under his charge. (p)

6. But an Executor, as hath been formerly implied, is not chargeable for any personal wrong done by the deceased, for it dies with his person; neither will an Action of Debt lye against him

(i) 7 Ed. 4. 8. per Littl.

(k) Cok. lib. Intr. 564. Such an Action in York-shire.

(l) Brownl. Rep. 18, 19, 22, 53, 2. part. 29. 81. 139. Coke 9. 86. & Plow. 182. F. N. B. 121. 2 H. 6. 35. 11 H. 4. 45. (m) Curia B. R. 21. (n) 27 H. 6. 4. b. 1 H. 7. 17. 2 H. 7. 8, 9.

(o) 27 H. 6. 4. 15 E. 4. 16. Coke lib. 9. fol. 87. 6.

(p) 2 H. 4. 12. Coke lib. 11. fol. 88. 5 H. 6. 35. 11 H. 4. 64. 91, 92. 9 H. 6. 12. Vid. cap. 22. 51.

upon the simple Contract of the deceased; but an Action of the Case only. Neither will an Action lye against an Executor upon an Arbitrement made in the life-time of the deceased, albeit it be made in writing: Neither will an Action lye against an Executor for Costs given in *Chancery* against the deceased in a Sute there, for it is lost when the party dies. And where there be many Executors and all have accepted, they must all be joyned in the Sute; but if some of them have refused, possibly the Sute may be good enough against the rest. (q) Otherwise, one Executor cannot be charged without his Co-Executors, except it be in the Case of Severance, and in some special Case where one alone doth the wrong; as where one Executor doth detain the Deeds from the Heir. (r)

7. Debt brought against the Executor of *H. W.* The Defendant pleaded, That he never was Executor, nor Administred as Executor. The Jury found, That the said *H. W.* died possessed of divers Goods, and that one *W. A.* was indebted Seven Pound to him, which the Defendant had received, and for which he had given his Acquittance, and that immediately after the death of the said *H. W.* the Defendant took into his possession all his Goods, converted them to his own use, enjoy'd them, and disposed of them to his own profit at his own will and pleasure. And whether upon this matter of Fact, the Defendant were Executor or not, was submitted to the Court, who were of Opinion, That this matter of Fact was the Administration as of an Executor, and that the Defendant should be charged accordingly.

Scire Facias, upon a Judgement against a Testator in Debt brought against his Executors, who pleaded, That before they had knowledge of this Judgement, they had fully Administred all the Testators Goods in payment of Debts upon Obligations. It was adjudged no Plea, for at their peril they ought to take knowledge of Debts upon Record, and ought first of all (unless Debts due to the Queen) to have satisfied them. It was adjudged accordingly.

Debt was brought by *S. B.* against *D. B.* and others Defendants Executors, &c. The Defendants pleaded Recovery against them by another in an Action of Debt, and shewed the Contents of the Record; to which it was Replied, That the Recovery was by Covin, to defraud the Plaintiff of his Debt, and hereupon Issue was joyned; it was found by Verdict for the Plaintiff, and agreed by all the Justices, That the Judgement should be against the Executor as against the Testators Goods, and not as against his own proper Goods; being hereunto upon good Advice inclined for several Reasons. (1.) For that the Plea was a void Plea; for the Record which the Defendant pleaded, was such as the Plaintiff doth confess and avoid, and not like that which is every way false; as when one pleads that he never was Executor, nor Administred

(q) *Adin* 1664.
Hill. 40 Eliz. B.
R. *Bowyers Case*,
Hill. 7 Jac. B. R.
per 3. Justices.
Cole 9. 39, 40.
Brook. tit. Execut.
78. 136. Fitzh.
Brief. 341.
(r) Brownl. 1.
part. 18, 19, 22.
§ 1. 2. part. 39.
§ 1. 139.

Mich. 5, 6 P. M.
C. B. *Stoker*
vers. *Forster*. An-
derf. Rep. par. 1.
Cal. 23.

Mich. 43 Eliz. C.
B. *Littleton and*
Hilbirt Case,
Cro. 3. par. 793.

Hill. 29 Eliz. C.
B. *Brasbridge*
vers. *Baskerville*,
Anderf. Rep.
Cal. 197.

ministred as Executor, &c. which Plea being every way false, and so within his own knowledge also, doth for that Reason cause that Judgement in that Case shall be of his own proper Goods. (2.) Another Reason is, That because such Judgement is most agreeable to Reason, viz. To give the Plaintiff Recovery of his Debt out of the Testators and not the Executors Goods, which is conceived a more reasonable way than to charge the Executors; for that they bear the burthen of the Administration of the deceaseds Will, they deserve to have as much favour as Reason will admit, and not be charged of their own proper Goods. It was further said, That if an Executor should be lyable to such Judgement of his own Goods, it would be a cause of often refusing the Administration of Testaments, for it is a thing of ill consequence to bind Executors in their own proper Goods in any other Cases than have been in fore-time adjudged; which Cases were cited out of divers Books, but here omitted for brevities sake; none of which Cases have any resemblance with this in question.

Debt was brought against an Executor, the Plaintiff Declared upon a simple Contract, To which the Defendant pleaded *Fully Administred*; It was found against him; and moved in Arrest of Judgement; for that the Action was against an Executor who is not chargeable in that manner; and it was said, That when it doth appear to the Court, that the Executor is not chargeable, the Court ought not then to Judge for the Plaintiff, and to this purpose some Books were cited, and it was said, That the Reason why an Executor shall not be charged upon a simple Contract, is, for that he is a Stranger, and cannot have notice of the Contract; and therefore the Law will not have him to be charged for that alope without somewhat else: But in this Case it appears that he had notice of the Contract, inasmuch as thereupon he pleaded *fully Administred*, and that Plea being admitted, it implies as if he had known of the Contract; and therefore when he pleaded that he had fully Administred, which was found against him, Judgement ought to have been given for the Plaintiff; for proof whereof a Judgment was cited, which appears to have been given, *An. 10 H. 6. fol. 15. and 13 H. 6.* As the Book sayes in the like Case against an Executor upon a simple Contract. All which notwithstanding, it was resolved by the Court, That the Plaintiff should take nothing by his Writ, giving their Reasons for such their Judgement, which for brevities sake are also here omitted.

Debt against an Administrator upon an Arbitrement made betwixt the Plaintiff and the Intestate in Writing; and the Defendant demurr'd thereupon; and without argument it was adjudged for the Defendant, because the Intestate might have waged his Law. But otherwise it were, if it had been in debt upon Arranges of Accounts before Auditors.

Assumpsit

Mich. 30, 31 Eliz.
C. B. Anderf.
Rep. Cas. 218.

Mich. 39, 40 Eliz.
B. R. Sawyer
vers. Garland.
Cro. Rep. par. 3.

Pasch. 29. 30 El.
B. R. Cottingham
vers. Hulet. Cro.
Rep. par. 3.

Assumpsit against an Executor upon the Promise of the Testator; and in the Declaration it was not averred, That he had Assets to pay debts, &c. But Mich. 29, 30 Eliz. It was adjudged, that the Declaration was good; and the Plaintiff recovered.

Trin. 28 Eliz.
Feibersstone vers.
Aylbon. Cro.
Rep. par. 3.

Debt against an Executor upon an Obligation made by his Testator; the Plaintiff was Non-suited, the Defendant had Costs by order of the Court. Otherwise it is where an Executor is Plaintiff, and is Non-suited. For it cannot be intended, that it was conceived upon malice by him. *Vid.* Stat. 23 H. 8. cap. 15.

Pasch. 29 Eliz.
Hampton vers.
Bayer. Cro. Rep.
par. 3.

Debt against an Executor upon an Arbitrement, made in the time of the Testator. It was demurred in Law, whether it lay or not? Because the Testator might have waged his Law. And adjudged without Argument that it lay not.

Pasch. 28 Eliz.
Aldworth vers.
Feel. Cro. par. 3.

Debt against P. as Executor. The Plaintiff had Judgement to recover *de Bonis Testatoris*. And thereupon a *Scire Facias* was awarded, and the Sheriff returned *Quod nulla habuit bona Testatoris*. And the Plaintiff surmisseth, that he had wasted the Testators Goods; whereupon he prayeth a *Scire Facias* why he should not have Execution *de bonis propriis*: And ruled by the Court, That this Writ shall not be awarded, upon the surmise of the party, upon a devastation; nor in any Case where the Judgement is *de bonis propriis*, unless it be upon return of the Sheriff, where he returns a *Devastavit*. *Vid.* 9 H. 6. 9. & 57. Fitzh. Execution. 9.

Pasch. 29 Eliz. C.
B. Ordway vers.
Godfrey. Cro.
Rep. par. 3. Pl. 20.

Scire Facias against an Administratrix to have Execution of a Judgement against the Intestate; the Defendant pleaded, *Quod nulla habet bona, quæ fuerunt Intestati, tempore mortis sue, in manibus suis Administranda, nec habuit die impetrationis brevis, nec unquam postea*. And it was thereupon demurred, and held by all the Court, that it was not any Plea; for a Judgement cannot be answered without another Judgement; and it may be, she had Administred all the Goods in paying debts upon Specialties, which is not any Administration to bar the Plaintiff. Or (as some said) it may be she had paid Debts upon a Statute or Recognizance, which is not allowable against a Judgement. But *Anderson* denied it; for there is not any Priority of Debts upon Record, unless in Case of the Queens Debt, which is first to be paid. And here the Defendant ought to have pleaded specially, how she had Administred. Wherefore it was adjudged for the Plaintiff.

Trin. 29 Eliz. C.
B. inter Woolley
& Bradwel, and
his Wife Executors
of Sir Tho.
Manners. Cro.
Rep. par. 3. Pl. 22.

The Defendant pleaded Out-lawry in the Testator, 29 Eliz. not reversed, and it was thereupon demurred. *Herne* for the Plaintiff moved, That it was not any Plea, because (admitting it to be a Plea) it should be, in regard of the Testators being Out-lawed, he could not have any Goods but what appertained to the Queen, and then the Executors might not have any Goods to satisfie: But that is not so; for the Testator might have a debt due to him up-

on a Contract, which is not forfeited; or, it might be, the Testator Devise Lands to be sold, and which are sold, the money is Assets in their hands; and in 3 H. 6. 17, & 32. it was holden to be no Plea. And of that Opinion were *Walmesley* and *Owen*. For a person Out-lawed may well make a Will, and have Executors, over and besides the Goods forfeited to the Queen, as in the Cases before put, and others of the same nature: But *Beaumont* *è contra*, for the Bar is good to a common intent; and these kind of Assets shall not be intended, unless they be shewn. Wherefore *prima facie* the Plea is good. *Anderson absente Adjournatur*. Afterwards for defect of pleading, without regard to the matter in Law, it was adjudged for the Plaintiff. 8 Ed. 4. 6. 21 Ed. 4. 5. 39 H. 6. 27.

Error of a Judgement in C. B. against Three Executors: The Error Assigned was, That one of them died pending the Writ before Judgement. And *Warkerton* moved, that this was Error; but when one of the Executors Plaintiffs die, this is no Error, for they might be severed: But the Court held it no Error. 3 H. 7. 1. 3. 8 Ed. 3. 110.

Scire Facis against Executors, upon a Judgement against their Testator in debt: They pleaded, that before they had any knowledge of this Judgement they had fully Administred all the Testators Goods in paying of debts upon Obligations; and it was thereupon demurred, and after Argument at the Bar, adjudged for the Plaintiff, that it was not any Plea. For they at their peril ought to take cognizance of debts upon Record, and ought first of all (unless for debts due to the Queen, whereto she hath a Prerogative) to satisfy them; and although the Recovery was in another County than where the Testator and the Executors inhabited, it is not material: But if an Action be brought against them in another County than where they inhabit, and before their knowing thereof they pay debts upon Specialties, that is allowable: wherefore it was adjudged accordingly. *Vid.* 4 H. 6. 8. 21 Ed. 4. 21.

Debt against an Executor, who pleaded he had *reines in ses mains*, but certain Goods distrained and impounded, it was adjudged to be no Assets to charge him.

The Case was, *A.* Covenanteth with *B.* to put his Son an Apprentice to *C.* or otherwise that his Executors shall pay *B.* Twenty pound. *A.* doth not put his Son an Apprentice to *C.* and dyeth; *B.* brings debt against the Executors of *A.* and it was Resolved by the Court, That it lyeth not for Two Reasons: (1.) It cannot be a debt in the Executor where it was no debt in the Testator: And if one Covenants to pay Ten pound, debt lyeth against him or his Executors, as 40 Ed. 3. & 28 H. 8. *Dyer* are: but if he doth Covenant that his Executors shall pay Ten pound, an Action lyeth

41 Eliz. C. B.
Anonymous, Cro.
Rep. par. 3. Pl. 19.

Mich. 4. & 42
Eliz. C. B. *Luttrell*
vers. Hibbins,
Cro. Rep. par. 3.
Pl. 37.

Mich. 25 Eliz. C. B.
Anonymous,
Cro. Rep. par. 3.
Pl. 8.

Paſch. 33 Eliz. C. B.
Frost *vers.*
Austin, Cro.
Rep. par. 3. Pl. 2.

eth not against them. (2.) The first part of the Deed sounds in Covenant, and the second part shall be of the same nature and condition. Q. of this Reason.

Vid. Cas. *Legate*
verf. *Pincheon*.
Mich. 9 Jac. B. R.
& Cas. *Lark* verf.
Thompson. Hill.
17 Jac. B. R. &
Cas. *Fancet* verf.
Charter. Hill. 20
Jac. B. R. *Qui*
omnes Casus in
Cro. Rep. par. 2.

Note, *Assumpsit* by the Testator lies against his Executor, in Case the Debt riseth upon a Loan and Promise of the Testator to pay, and the Promise be for the payment of a meer debt, and not to do any collateral Act, and where the Testator himself, by reason of such Promise, could not have waged his Law; in such Case his Executor is chargeable; but upon a meer collateral Promise of the Testator, an *Assumpsit* lies not against his Executor. Such was the Opinion in Q. Eliz. time: but now in Reg. Jac. the Opinion of both Courts was, and resolved, That the Action against the Executor lies as well in the one Case as in the other.

Hill. 11 Jac. C. B.
Harecourt verf.
Nrenbam. Moo.
Rep. nu. 1178.

Scire Facias Sued by H. against W. Executor to his Father for Execution of a Judgment obtained against the Testator. The Defendant pleaded *Plene Administravit* at the time of bringing the Action; and thereupon they were at Issue, and the Jury found, That the Testator conveyed a Lease in trust to one Fisher, against whom the Executor had recovered One Thousand pound in Chancery, which was come to the Executors hands, *Et si super tota materia, &c.* Two Points in this Case were argued at the Bar and Bench: (1.) Whether the Plea of *Plene Administravit* at the time of bringing the Writ were good, in that Judgement was given against the Testator in his life-time; and it was Ruled, that it was not good, but that in such Case the Executor should have pleaded, There was nothing in his hands at the time of the Testators death, because the Judgement bound him to satisfy that debt before others: but by the joyning of Issue the advantage of that exception to the Plea was waved. (2.) Whether the Summ Decreed in Equity in the Chancery shall be Assets; and they all agreed it should be Assets, because the Jury found, that by virtue of the Executorship it was come to the Executors hands. 9 Eliz. Dyer 264. And money arising of the sale of Lands by Executors shall be accounted Assets. *Chapman* and *Daltons* Case. *Plowd.* Also Damages recovered by Executors *pro bonis asportatis in vita Testatoris* shall be Assets. *Vid. Pasch. 39 Ed. 3.* and C. B. *Ordinary* and *Godfreys* Case.

Hill. 17 Eliz.
Watsons Case.
Moo. Rep. nu.
512.

W. And others brought D. against the Defendant as Executor, he pleaded *Plene Administravit*: And it was found by Verdict, That the Defendants Wife was made Executrix, who to defraud the Creditors, had made a Deed of Gift of the Goods before her marriage with the Defendant, and yet retain'd them in her possession, and took the Defendant to Husband, and died; and the Defendant had now as much goods in his hands as would suffice to pay the Creditors their debts. And the Court adjudged for the Plaintiff,

Plaintiff, for that the Defendant confels'd himself Executor by pleading *Fully Administred*, and therefore is chargeable, because the property of the Goods passed not out of the Wife by that Grant, being fraudulently made as aforesaid, by the Stat. 13 *Regin.*

One sued an Executor in the Ecclesiastical Court for a Legacy, who pleaded Recovery in debt against him at Common Law, and beyond that he had not Assets wherewith to satisfy. To which the Plaintiff in the Ecclesiastical Court Replied, That the Recovery was by Covin, and that the Plaintiff in the Recovery offered to discharge the Judgement, and the Defendant would not. And hereupon the Question was, whether a Prohibition should be awarded or not. And it was Resolved, That it should not be awarded, for that the Covin or Fraud is properly examinable in the Ecclesiastical Court, because the Legatee cannot sue for his Legacy at the Common Law.

Action upon the Case of Trover of Goods; The Case was this, a Recovery in the Exchequer was had against the Executor of P. of Debt and Damages, and *Fieri Facias* issued *de bonis Testatoris*, *si &c.* And if none, then *Damna de propriis*: the Executor dies, the Sheriff levies Execution of the Testators Goods before the Return of the Writ, and adjudged good notwithstanding his death after the Test of the Writ.

E. brings Debt against H. on a Demise for years to one unto whom H. was Administrator: And the Writ was in the *Debet* and *Detinet*. Whereupon in Arrest of Judgement it was shew'd in B. R. That it ought to have been in the *Detinet* only, because against an Administrator: But it was adjudged, That it was good in the *Debet* and *Detinet*, because the Rent due incurr'd in the Administrators time, and the Land is not Assets, but only so much of the Profits as the Land is worth above the Rents; and the Administrator shall not answer for more than the Land is worth, deducting the Rent: But in all Cases where an Executor or Administrator brings an Action for a Duty Testamentary, there it ought to be in the *Detinet* only, because the Duty being demanded, ought to be Assets.

An Executor is not chargeable for a Debt due by the Testator upon a simple Contract. Regularly an Executor shall not be charged without Specialty in any Action wherein the Testator might wage his Law, for that an Executor cannot wage his Law of other mens Contracts. 46 *Ed.* 3. 10. *b.* 11 *H.* 6. *b.*

Information in the Exchequer in nature of an Account was brought against D. Executor of W. M. supposing that W. M. had received money of the Queens amounting to One thousand five hundred pound, upon a special Verdict; the Case was, That W. M. had received annually out of the Exchequer Fifty pound as a Fee

Pasch. 14 Jac.
Lloid vers. Mad.
dow. Moo. Rep.
nu. 1307.

Hill. 31 Eliz.
Moff vers. Pack.
Moo. Rep. n. 473.

Case Boddy vers.
Hargrave, Moo.
Rep. nu. 771.

10 H. 6. 25. Co.
9. Finchon 88.
Roll. Abridg.
Adjudged insee
Germaine and
Rowles.

Hill. 29 Eliz. B.
R. Dodington's
Case. Cro. Rep.
par. 3.

for his Diet for Thirty years together, which was paid him by the Command of the Lord Treasurer; who had Authority by Privy Seal to make allowance and payment of all Fees due, but in truth, these were not any due Fees: And whether his Executor shall be charged with these Sums so received, was the Question. And after Argument it was adjudged, that he should be charged; for it was held, That this payment of the money by the appointment of the Lord Treasurer, was not allowable; for the Privy Seal is not sufficient Authority to dispose of the Queens Treasure, unless where it is due; and he disposing of it otherwise, it is out of his Authority. (2.) It was held, That this money delivered by Authority of the Lord Treasurer, who is *quasi* a Judicial Officer, and it was *quasi* a Judicial Act by him; yet it shall not bind the Queen; for it was without his Authority, and without warrant, to make allowance thereof, not being due; and it is at his peril who receives it, or demands allowance thereof. For these and other Reasons (*mentioned in the Report*) it was adjudged for the Queen against the Defendant, and although he were Executor, he should answer for it as a debt from the Testator. 11 Co. 90. b.

Mich. 37, & 38
Eliz. in Cam.
Scac. Stulbins
vers. Rotheram.
Cro. Rep. par. 3.

Error upon a Judgement given in an *Assumpsit* against an Executor upon a Promise of the Testators, where the Plaintiff declared, That the Testator in consideration of Marriage promised to pay the Plaintiff One hundred pound, and for non-performance of this promise brought the Action, and Judgement there given for the Plaintiff: and this matter was assigned for Errour, that the Action lay not against an Executor; and all the Justices and Barons (besides *Clark Baron*) held it to be Erroneous for this cause: For *Anderson* said, The Reason why Debt lies not against an Executor upon a Contract of the Testators, is, because the Law doth not intend that he is privy thereto, or can have notice thereof, and he cannot gage his Law for such a debt as the Testator might; and when debt will not lie, it is not fit that this Action upon a bare Promise should bind him; for it stands upon one Reason; And if these Actions should be allowable, it would be very mischievous, wherefore the Judgement was reversed. Q. Whether a Recovery in this Action against an Executor, is allowable against a debt upon an Obligation, if it should be an Administration; for then it would be mischievous to Creditors; and if it should not be an Administration, it would then be mischievous to Executors, that they should be charged therein, and not have allowance thereof against other Creditors; for it may be, that at the time of the Recovery they did not know of other debts. Note, that this Term was given the like Judgement betwixt *Griggs* and *Helhouse* in an Action brought against an Administrator upon a Promise of the Intestates to pay money, &c.

Debt against the Defendant as Administratrix of J.S. upon *plene Administravit* pleaded, it was found by Verdict, That the Testator at the time of his death had Goods to the value of One hundred pound, and was bound to another by Obligation in One hundred pound, and that the Defendant had taken in this Obligation, and made another in her own Name with Sureties to the Obligor. And upon the motion of *Heale*, the Court held, That this was an Administration, and it is in the nature of a payment, and so much of the Testators debt is thereby discharged; and so it was said to be adjudged in *Woods Case*. *Nota, fuit* Ruled accordingly. *Pasch.* 30. in *C. B.* which was entered, *Mich.* 28, 29 *Eliz.* inter *Stamp & Hutchins.*

Mich. 30, & 31
Eliz. B. R. *Mar-*
tyn ver*fic.* *Allice*
Whipper. *Cro.*
Rep. par. 3.

Action upon the Case on *Indebitatus Assumpsit* doth well lye, for every debt implyes a Promise; and it is one good consideration in *Falso* whereon to found an Action: But for a debt by simple Contract due by the Testator no *Assumpsit* lies against Executors, and it was openly delivered by *Popham* Chief Justice, *No.* 44 *Eliz.* to be the Resolution of all the Judges, and to be a President in all Cases, that might after happen.

Mich. 44, 45 *El.*
B. R. *Stade &*
Morley Case.
Yelv. *Rep.*

It was agreed by *Yelverton*, *Williams* and *Crook*, Justices, That if a man by Indenture lease Land to *J. D.* for years rendring Rent, and *J. D.* dye making *A.* his Executor, the Lessor may have Action of Debt against the Executor for the Rent reserved, and the Arrears thereof after the death of the Lessee, albeit the Executor never enter nor agree to the Lease; for the Executor represents the Testators person, and the Testator by the Indenture was stop'd, and concluded to pay the Rent during the Term upon his own Contract; and albeit the Rent exceeded the value of the profit of the Land, yet the Executor cannot waive the Land, but notwithstanding that shall be charg'd with the Rent. *Vid. Opin. Ascue*, 21 *H. 6.* 24. & 11 *H. 4.* *Contr.*

Mich. 5 *Jar.* B.
R. *Howse &*
Webster Case.
Yelv. *Rep.*

Action *Sur Trover* and *Conversion* of Goods, upon demurrer the Case was; The Ordinary committed Administration of the Goods of an Intestate to the Defendant; afterwards the next of Kin sues out a Citation in the Ecclesiastical Court against the Defendant to Repeal that Administration, and he (*pendente Lite*) sells those Goods, and afterwards his Administration is Repealed, and Administration committed to the Plaintiff, who for this Conversion (*pendente Lite*) brings this Action; and it was moved for the Defendant, that this Action lyes not, for the Administration at the Common Law is well committed, and the Statute doth not alter the Law in this point, but gives a penalty against the Ordinary, if he commits them not to the next of Kin, and the Administrator till Administration Repealed hath an absolute Authority to dispose of the Goods as he pleaseth. *Tanfield*, & *contra*, The Conversion

Hill. 57 *Eliz.* B.
R. *Wilson* ver*fic.*
Packman, *Cro.*
par. 3.

pendente Lite in the Ecclesiastical Court is not lawful, but is a Tort to the Plaintiff, and that the Sentence there proves, which is, that all things attempted or done *pendente Lite* shall be void, and the Justices ought to have regard to the Civil Law in this point, as in 27 H. 6. *Guard*, 118. 2 R. 2. *Quare impedit*, 143. and 4 H. 7. 13. And by the Sentence it appears, that the Administration is revoked as if it never had been; and upon this reason it is in *Dyer* 339. where an Administrator recovered a debt, and afterwards another procured himself to be joyned in the Administration, and released the debt, and afterwards it being revoked, this release was not any bar to the execution. And *Mich.* 25, 26 *Eliz.* in the Common Bench between *White* and *Cary* this very point was in question, and adjudged, that the Action lay. *Gawdy*, The Action well lies, for the Sentence doth not repeal mean Acts done by an Administrator which are for the Intestates benefit; but forasmuch as these Goods were not converted or employed for the Intestates use, it is reasonable that he should be charged for them. *Popham* and *Fenner* *è contra*. For the Administrator hath an absolute interest and power to dispose of the Goods, untill the Repeal be made; and it is not like unto an Appeal upon a Sentence, for that makes it as no Sentence; but the Repeal of the Letters of Administration doth not void it *ab initio*, and make a lawful Act Tortious, but rather in this Case the new Administrator shall have an account for the money received; and the words in the Sentence are not to be regarded, for they are common and ordinary in all Sentences. So he having the Goods lawfully, and converting them lawfully, shall not answer for them as for a Tort done. And *Popham* here said, If Administration being committed, the Ordinary commit new Administration, it is a Repeal of the former without any Sentence of Appeal; and if the first Administrator waste the Goods, the Debtee shall have the Action against him; and if he pleads that Administration is committed over, he may well by this Repliation maintain it, because he wasted the Goods when he was Administrator, wherefore &c. *Et Adjournatur*; but afterwards the Action was discontinued by the Plaintiff.

Tsin. 27 Eliz. C.
B. Snelling verſ.
Norton, Cro.
par. 3.

Debt against one as Administrator to N. upon an Obligation; the Defendant shews the Custome of *London* to be, That if a Contract be made by a Citizen, to pay money to another Citizen, and he who made the Contract dies, that his Executors or Administrators shall be chargeable therewith, as if it were upon an Obligation; and shews further how the Intestate was indebted upon a Contract to A. who had Recovered against him, and that he had *Rienr ouster en ses maines*, &c. And it was thereupon demurred. *Glanville* moved that this Custome was not good; For (1.) it is against Law,

Law, That an Executor or Administrator should be charged upon a simple Contract, wherefore *Se. Daniel è contra*, The Custome was alwayes to bind the Executors or Administrators to pay Debts upon Contracts, and Customes in *London* are confirm'd by Parliament, and are now as strong as a Statute; and therefore in *London* they prescribe to give Land in *Mortmain*, which is against Statute Law; and there is not any Custome, but that it deprives, and is against the Common Law in some point. And this Custome is reasonable, for a Debt upon a Contract is as well due as a debt upon an Obligation, and therefore there is as great reason for the payment of the one, as of the other; although the Law hath given a greater Prerogative, *viz.* a Priority of paying the one, rather than to the other, *Se. Owen Justice*, The Custome is reasonable; for the Executor in Conscience is bound to pay Debt upon a Contract as well as upon a Specialty; and such a matter was about four years since in this Court, but not adjudged. And of that Opinion were the other Justices, especially as this Case is, being executed against him who is liable and chargeable by the Customes of *London*.

Adjudged *per totam Curiam*, That where an Executor is Plaintiff for any thing touching the Testament, and is Non-suite, or Verdict pass against him, he shall not pay Costs, by the Statute of 4 *Jac.* For the Statute ought to have a reasonable intendment, and no default can be presumed in the Executor who complains, because it concerns other mens Fact, whereof he can have no perfect knowledge; and so it was resolved and adjudged by all the Justices of the Common Pleas. *Quod Nota.* A Judgement establish'd by both Courts, contrary to some few Presidents, which were in *B. R.* to the contrary. *Quod Nota.*

Mich. 7 Jac. B.R. et
Telv. Rep. Exe-
cutor ne patera
Costs sur le Stat.
4 Jac.

C H A P. XXIV.

Of Assets charging Executors, or not.

1. *What Assets are, and the several qualifications thereof.*
2. *Whether Damages recovered by an Executor be Assets.*
3. *Mortgages redeemed by the Executor, and Chattels reverting to him upon failure of some Condition by the Legatary to be performed, are Assets in his hands.*
4. *Encrease gotten to Executors by Merchandizing with the Testators Goods, and other things never in the Testators possession, are Assets in the Executors.*
5. *Debts due to the Testator are no Assets in the Executor, till recovered or released by him.*
6. *Whether Land devised to be sold for payment of Debts and Legacies be Assets.*
7. *An Executor dying indebted, and leaving to his Executor such Goods as he had as Executor, These are not Assets in such Executors Executor lyable to the last Testators Debts.*
8. *Whether an Advowson be Assets.*
9. *How real Chattels may turn into Personal Assets.*
10. *In what Case a Debtee-Executor may retain Money or Goods of the Testators, which shall not be held Assets as to other Creditors.*
11. *Other mens Goods in the Testators possession at his death, shall not be Assets in the Executors hands.*
12. *Executors discharged of Assets as to so much as they pay of the Testators Debts with their own Money or Goods.*
13. *Certain Law-Cases touching Assets.*

1. **A** SSETS are where one indebted dieth Testate or Intestate, and his Executor or Administrator hath sufficient in Goods or Chattels, or other Profits to pay the deceaseds debts, or part thereof, and for so much he shall be charged : (a) So that all such Goods, Chattels, and Actions which did belong to the deceased in right of Action or Possession as his own, and so continued to the time of his decease, and which after his death the Executor or Administrator doth get into his hands, as of right of his Executorship or Administration, and all such things as accrew to the Executor or Administrator by reason thereof, and nothing else, shall be Assets in their hands to oblige them in Law as chargeable to the deceaseds Creditors or Legataries. So that all things valuable may be Assets, but such things as are not valuable are not

(a) *Terms of law.*
& Coke sup.
Littl. 374.

not Assets. (b) Note that Assets in the hand of any one of the Co-Executors shall be understood as Assets in the hands of all the Executors, (c) be it in any County or place whatsoever. (d) All the Testators Goods and Chattels in Action or in possibility at his death, and afterwards recovered by his Executors, are Assets in their hands, but not till recovered and come into their possession; therefore Debts of any kind whatsoever due to the deceased, are not Assets in his Executors or Administrators hands to charge them until they be Recovered: (e) But whatever an Executor or Administrator must Sue for, by or under that Name or Appellation, is (being Recovered) Assets in his hands. (f) Yea, notwithstanding an Executor or Administrator doth purchase the Fee-Simple of that Land, wherof he had a Lease for years in right of the deceased (whereby the Lease is drowned) yet the said Lease shall still continue to be Assets in his hands. (g) Or if Executors do sell the Goods of Testators and buy them again, they remain as Assets in their hands, because they are the same Goods which were the Testators. (h) If a man hath a Lease for years, worth Fifty pound *per annum* or more, out of which he payes Ten pound yearly Rent, and dies; in this Case not the full value of the Land yearly, but only so much as is above the said Rent shall be deemed Assets in the hands of the Executor or Administrator. (i) Or suppose the deceased dies possessed of Goods and Chattels to the value of Two hundred pound, and in debt to M. Two hundred pound, and to N. One hundred pound, and to O. Fifty pound, and to P. Twenty pound, and Composition is made with M. for Sixty pound, or other Summ more or less under Two hundred pound; In this Case the Executor is deemed to have Assets chargeable to the other Creditors for so much as is above the Summ so compounded unto Two hundred pound. (k) Or where a man is indebted Forty pound to one, and Thirty pound to another, and dies, leaving but Forty pound in all, and his Executors agree with the Creditor of Forty pound for Ten pound, and have his Acquittance for the Forty pound, yet the Thirty pound remaining in their hands shall be Assets. (l)

2. If Executors do Recover any Damgages for Trespas, or other wrong done to the Testator, the money recovered will be Assets in their hands, as well as Debts recovered upon Bonds, or Bills, or Lands by them taken in extent upon Statutes, Recognizances, or Judgements. (m) Yea, without ever having these monies, Executors may make them Assets in their hands, *viz.* by making Releases, or Acquittances, or Acknowledgement of Satisfaction; for this amounteth to a Receit, and chargeth the Executors towards the Creditors with the whole penal Summ, though possibly they receive but part, as the Principal, or some such proportion:

(b) Coke sup. Litt. 388.

(c) Kelw. 51.
(d) Coke 6. 47.

(e) Coke sup. Litt. 124. 5. 31. Broo. Assets 24. Dyer 264. 121. 2 H. 4. 21. Coke 6. 58. Kelw. 62. Dyer 362.

(f) Curia. Mich. 13. B. R. Coke 1. 98. Plowd. 84. 292. Coke 5. 34. (g) Coke 1. 87. Brook. Lessee. 63. (h) 13 H. 6. 4.

(i) Brownl. Rep. 1 part. 33. 76. & 2 part. 47.

(k) 27 H. 8. 6.

(l) Fitzh. 27 H. 8. 6.

(m) So held in Sales case of Damages in Q. 2. Inp. Receiv. cont. of the p. judgment.

portion : But Debts or Damgages recovered by a Judgement had by the deceased in his life-time, whereof no Execution was, are not Assets in his Executors or Administrators hands, until Execution be made; yea, though Execution be made, and the Damgages so recovered that they be gotten into the Executors hands or possession, yet if the Judgement be Erroneous, and the Execution avoidable, it shall not be deemed Assets in his hands; for which Cause a Debt Sued and Recovered by one as Administrator to *A. B.* and afterwards a Testament made by *A. B.* produced and proved, is not Assets in the Administrators hands, because the Executor in the said Testament may recover it from him.

(n) *Frewick*
20 H. 7. 2.

(o) 21 H. 7.

(p) *Case int.*
Chapman & Dal-
son. Eliz. Reg.
Plowd. Com.

3. A Mortgage Redeemed is Assets, unless the Executors redeemed it with their own money. (n) Likewise Goods of the Testators redeemed by the Executor with the Testators money, are Assets in the Executor; it is otherwise if the Executor having no monies of the Testators doth redeem them with his own money. (o) If the Testator grant a Lease for years, or Horses, Sheep, Plate, or other Cattle unto *A.* upon some Condition that *A.* did not perform after the Testators death; in this Case the Chattel reverts and comes back to the Testators Executors, and is Assets in their hands. Also if *A.* Covenant with *B.* to make him a Lease of such or such Land by such a day, and *B.* dieth before the day, and before any Lease made; now must *A.* make the Lease to the Executor of *B.* and the Lease so made to him shall be Assets in his hands, (p) because the Executor shall have the Term only as Executor : So if *A.* undertake to deliver in to *B.* Twenty loads of Coles, Wood, or other Merchandize whatsoever, and this is not performed in the life of *B.* but afterwards to his Executor; this shall be Assets in his hands as well as the money recovered in Damgages for non-performing should have been. Likewise any Goods or Chattels whatsoever given or bequeathed to any person by the Testator upon a Condition certain, and the Condition not afterwards performed by such Conditional Legatary, the said Goods and Chattels conditionally bequeathed do revert to the Executor, and become Assets in his hands.

(q) 11 H. 6. 35.
per *Babington.*
(r) 21 E. 4. 4. b.
11 H. 6. 35. b.
3 H. 6. 2. & 2 H.
4. 21. & 1 H. 4.
6. & Co. in *Littl.*
1. 2. cap. 11.
Sect. 192.
(s) *Offis. Exec.*
c. 6. *Resolved by*
three Judges,
temp. Eliz.

4. Encrease gotten to the Executors by Merchandizing with the Testators Goods, shall be Assets in their hands, and shall charge them. (q) Likewise Damgages recovered by an Executor in an Action of Trespas, shall (as aforesaid) be Assets, and yet they were never in the Testator. (r) Also if a Lease be made to one for life, the Remainder to his Executors for years, and he dieth, this will be Assets in the hands of his Executors, though it never were in the Testator. (s) So where a Lease for years is bequeathed to *A.* for life, and after to *B.* who dieth before *A.* although *B.* never had this

this Term in him, so as that he could grant or dispose it, yet shall it rest in his Executor as his Goods, and be Assets in his Executors hands. (†) Likewise a Remainder for years, so in the Testator, that he might grant or dispose it at his pleasure, though the same fell not in possession to the Testator in his life-time, yet this is Assets to the Executor, even whilst it continues a Remainder, and before it falleth into possession, because it is presently valuable and vendible. In like manner Gain gotten by Trading (as aforesaid) with the Testators money, Wool growing upon Sheep after the Testators death, also the encrease of Sheep or other Cattel after the Testators death, though never in the Testators actual possession, shall yet be Assets in the Executor. Likewise a Feoffment made to the Feoffors use for life, and after him to the use of his Executors or Assigns for a certain number of years, that number of years shall be Assets in the hands of the Feoffors Executor. Also Goods hypothecated or pledged to the deceased in his life-time and not redeemed, or the money thereof when redeemed, is Assets in the Executors or Administrators hands. Likewise the money raised by the Sale of the deceaseds Lands, sold by his appointment by the Executors for the payment of his debts (as when the deceased did in his life-time appoint that his Executors shall sell his Lands to pay his debts) shall as aforesaid be Assets in the Executors hands. (u) Also if Executors had a Villein for years, and the Villein purchased Lands in Fee, and the Executors entered, they had a Fee-Simple, but it was Assets. (w) The reason was, because they had the Villein *in antea droit*, viz. as Executors to the use of the dead. And if Executors having Assets, do waste it, or pay Debts or Legacies in any other order or method than the Law hath prescribed, they must answer it out of their own Estates. (x)

5. Debts due to the Testator be not Assets in the Testators hands so as to charge him for the payment of Debts and Legacies, until Judgement and Execution had, or they be otherwise recovered, received, or released by him. And an Executor paying the just value of the Testators Goods to the Creditors, may retain the same Goods in his hands, which nevertheless shall not afterwards charge the Executor as Assets. But if question be concerning the value, it is received by all, that the value upon the apprezment is not binding, nor much to be respected in a contest at Law, for if it be too high it shall not prejudice the Executor, if too low, it shall not advantage him; but the very true value as it shall be found by Jury when it comes in question, whether the Executor hath fully Administred, or hath Assets or not, is that which is binding in Law.

6. If a man give Lands by his Will in Fee to his Executors to be sold for performance of his Will, these even before the money

(†) Ibid.

(u) Co. sup. Litt. 388. 5. 24. Dyer 362. Kelw. 63. Co. sup. Litt. 54. 20 H. 7. 4. Brook. Assets 12.
(w) Co. sup. Litt. lib. 2. cap. 11. Sect. 173. & 192. Dr. & Stud. & Broo. tit. Villeinage. 70.
(x) *Terms of Law*. & Coke 6. 46. Dyer 272.

(y) 3 H. 6. 3. &
2 H. 4. 2. &
9 Eliz. Dyer
264. & 14 Eliz.
Dyer 31.

(z) Co. sup. Littl.
lib. 2. c. 3.
Sect. 169. & lib.
2. c. 5. Sect. 183.

(a) Brownl. 2.
part. 47.

(b) 9 Eliz. Dyer
264. & 14 Eliz.
Dyer 31.

(c) Brook. Exec.
51. 2 H. 4. 21.
& 3 H. 6. 3.

(d) Plowd. Com.
525. Int. Bransby
& Grantham.
P. 20 Eliz.

(e) Sales Case, in
Com. Ban.
Mich. 32. & 33
Eliz.
(f) Co. sup. Littl.
l. 2. c. 13. in fin.
Sect. 71.

be raised are Assets both for payment of Debts and Legacies. (y) But if the Land be given only for payment of debts, they shall then only be sold for that purpose, and not for payment of Legacies: But the profits of the Land before it be sold are not in that case Assets; but let the Executor see to the sale thereof in due time limited and prescribed by Law, lest the Heir Enter; for Regularly the mean profits of Lands, devised to be sold, shall not till the sale be Assets in the Executors hands, unless it be otherwise devised by the Testator. (z) And although Lands devised to Executors for years, are Assets in their hands; yet if the Testator Devise, that his Executors shall sell his Lands; this is not Assets until the Land be sold, and the money received for the same shall be Assets. (a) Notwithstanding what hath been here said in this point, and although Lands given for the payment of Debts and Legacies were Assets before the Statute of 21 H. 8. cap. 5. which sayes indeed, that if one Will by his Testament any Lands, &c. to be sold, neither the money thereof coming, nor the profits taken, shall be accounted as any of the Goods or Chattels of the Testator; yet since that Statute, viz. in the late Queens time, the Law was twice admitted still to be according to the third of H. 6. viz. That Land given to Executors for the payment of Debts and Legacies is Assets, and so the money thereof coming. (b) Likewise, if a man make a Feoffment upon Condition, that the Feoffee shall sell the Land and distribute the money to the Testators use; whereupon he selleth the Land, and the Feoffor maketh him his Executor, the money received for the Land sold shall be Assets in his hands. (c)

7. As the Goods which a man hath as Executor to another, are not liable to be taken in Execution for his own debts, either upon Recognizance, Statute or Judgement had against him: So if such a one die indebted, leaving to his Executor such Goods as he had as Executor, these shall not be Assets in the hands of such Executors Executor, as subject to the payment of the Last Testators debts, but liable only to the payment of the Debts and Legacies of the first Testator. (d)

8. If the Grantee of the next Avoidance of a Church, dies after the Church becomes void, and before he presents; In this Case the Grantees Executor by presenting whom he please, shall not thence be understood to have Assets for the payment of the debts of such Grantee or Testator, for that legally no profit could be made of such presentment; yet if in that Case a Stranger should happen to present, and thereupon such Executor of the said Grantee in a *Quare Imped.* recover Damgages, the money of such Damgages so recovered shall be Assets. (e) Yet it is by good Authority said, That an Advowson is Assets; (f) but a Seigniori of Homage.

Homage or Fealty, or in free Almoigne is no Assets, because not valuable. (g)

(g) Ibid.

9. As the Testators Debtors Land after Execution taken by the Executor in Extent, turns a Personal Duty into a Real Chattel, and into Real Assets: So money paid to the Executor by such a Debtor for such an Extent, or by a Mortgage for a Mortgage of a Lease for years, turns these Real Chattels into Personal Assets charging the Executor. Note, that Assets must be in State or Interest, and not in use or right of Actions, or Rights of Entry, for they be no Assets until they be brought into Possession. (†)

(†) Coke sup.
Littl. lib. 2. cap.
13. Sect. 742.

10. A Debtee making the Debtor his Executor, or dying Intestate, Administration be committed to the Debtor; this Debt as for so much shall still continue as Assets in his hands as to other Creditors; yet a Debtor making the Debtee his Executor, he may retain so much as to satisfy his own debt, and it shall not be deemed as Assets to any other Creditor. As suppose *A. B.* having Goods to the value of One hundred pound dies Intestate, and obliged to *C.* and *D.* in One hundred pound a piece, the Administration of whose Goods is committed to *E. F.* and then afterwards *C.* dying maketh the same *E. F.* his Executor; In this case the said *E. F.* may retain the One hundred pound for satisfaction of his own Debt, and it shall not be deemed as Assets in his hands, as to satisfy *D.* or any other Creditor. (*) But an Executor of his own wrong, to whom the deceased was indebted in a certain sum of money, entering upon so much of the deceaseds Goods to the value of his debt, thereby intending to pay and satisfy himself, shall be held chargeable with so much as Assets in his hands, for the satisfaction of any of the deceaseds Creditors or Legatees. (b) Likewise the Executors of an Administrator are chargeable, where he did neither pay the debts, nor leave the Goods to the Administrator, but otherwise disposed of them. (i)

(*) *Barnett Case*,
Hill. 8 Jac. Plow.
184.

(b) Coke 5. 30.
Dyer 2.

(i) Offic. Ex. fil.
199.

11. Other mens Goods and Chattels in the Executor or Administrators hands that were in the deceaseds possession, whether he had or had not right to them, so as they belong not to the Executors, make not the Executor or Administrator chargeable, they being not Assets in his hands. For this reason, if another mans Goods happen to be among the deceaseds goods, and they all without distinction come to the Executors or Administrators hands, this other mens Goods shall not be Assets in their hands. Nor are Rents belonging to the Heir, though received by the Executor, any Assets in his hands; neither are the Goods and Chattels of a person Deceased and Out-lawed at the time of his death any Assets in his Executors hands, because he was disinterested thereof by the Out-Lawry. (k)

(k) Kelway 62.
Coke 6. 58. Dyer
262. Dr. & Str.
lib. 2. cap. 3.

12. An Executor having Goods of the deceased to the value
of

of One hundred pound, taking up an Obligation of the Testators of the same sum, and really paying the money, is discharged from having Assets as to this to any other, for that the property thereof is now solely in himself. The Case is the same, if he surrender his own body, or give the body of another for him to the Testators Creditor for the debt; but a bare Promise made by the Executor, or another for him, to pay the Testators said debt, will not discharge him of Assets. (l) But if Executors do really pay the Testators Debts of their own Goods, they may retain the Testators Goods to the same value to their own use. (m) So that the Executor paying the just value of the Testators Goods to his Creditors, may retain the same Goods in his hands, which shall not charge the Executor as Assets. Finally, this is a sure Rule, That where no fault is in the Executor, there he shall not be bound to pay more for his Testator than the Testators Goods do amount unto.

(l) Goldsb. 79.
Pl. 15.

(m) 6 H. 8. 2.
Dyer fol. 2. &
fol. 187.

13. Action of Debt was brought against Executors; the issue was, whether there were Assets in the hands of the Executors the day of the Writ brought; it was given in Evidence for the Plaintiff in the Action, That the same day the sum of One hundred pound was paid to the Executors in the Prerogative Court, and presently by the Order of the said Court, the Executors paid the said One hundred pound to another Creditor of the Testator; but the Opinion of the Court was, in regard the money was once in the Executors hands, that payment of it over, by the Order of the Court of Prerogative, was not to the purpose; and therefore the same was adjudged to be Assets in their hands: But yet it was holden, That upon special pleading of such matter, peradventure it might not be Assets in their hands, to pay another debt. (n)

(n) 4. & 5 Ma.
Dyer 208.

When an Administrator compounds with one who hath a Judgement of One hundred pound for Sixty pound, who offereth to acknowledge satisfaction upon Record, and the other defers it to the intent to suffer it to stand in force to deceive a Creditor; this shall not hurt the Creditor, but he shall recover; and the money remaining in the Administrators hands shall be Assets, notwithstanding such Composition. (o)

(o) Pasch. 8 Jac.
in C. B. Turners
Case, Co. 8. part.
132.

If I devise Lands to my Executors for Three years for the payment of my Debts, and I make Executors, and dye; this is Assets in my Executors hands. But if I Devise my Land to be sold for the payment of my Debts, and I make Executors, and dye; this is no Assets before the Lands be sold. (p) Also if an Executor doth make gain of the Testators money, the same shall be Assets in his hands. (q)

(p) Pasch. 9 Jac.
in C. B. Brownl.
1 part. 24. vid.
Hill. 10 Jac. in
C. B. Brownl. 2.
part. 17. acc.
(q) Hill. 12 Jac.
in C. B. Rott.
1563. Harcock &
Hinchams Case.
Brownl. 1 part.
79. 77.

It is not requisite, that every Assets be a thing in possession, or once in the hands of the Testator; for a thing may be Assets which

was.

was never in the Testators hands, if those things come in lieu of the things which were in the Testators hands, as money for Land or other Goods sold. Also things in Action or Possession, certain or uncertain, if they be released, are Assets; the reason is, because by such release is given away that which might have been Assets: And therefore if Trespass be done to the Testator in his life-time, for taking his Goods, and he dieth, and his Executors release all Actions, the same is Assets, because it might be proved to the Jury, That had the Executors not released, but had brought their Action of Trespass *de bonis asportatis in vita Testatoris*, that they might have recovered Damages, which would have satisfied Debts or Legacies; and therefore the release of Executors in such Case shall be Assets. (r)

An Administrator may take the Goods which are given by the Intestate to defraud Creditors, for that the gift is void, and therefore they shall be accounted Assets. Also, if a man doth Administer as Executor, and then takes Letters of Administration; it is at the Election of the party to Sue him as Executor or Administrator. (r)

If a Testator Mortgages a Lease for years, and dies, his Executors may redeem it with their own money; and the Lease shall be Assets in their hands, for so much as the Lease is worth above the sum which they paid for the redemption of it. (r)

If a Debtee dye Intestate, and the Ordinary commit Administration to the Debtor, whereby the debt is extinct, yet it shall be Assets in his hands as to debts, because the Ordinary had no power to discharge the debt, as was agreed *per Curiam*.

If a Feme Executrix to her former Husband, take another to Husband, to whom her former Husband was indebted, the debt is extinct, and shall not be Assets.

It was held by all the Justices, That if a Feme Executrix hath a Term, and she take a Husband, who purchased the Reversion, the Term is extinct as to the Feme if she survive, yet in respect of all Strangers she shall account as Assets in her hands.

Debt against D. as Executor, the Defendant pleads *Plene Administravit*, and issue upon Assets; the Jury found, that he Administered, and had Assets in Ireland: And whether that were Assets here, they prayed the discretion of the Court; and all the Justices (besides *Walmesley*) held that it was well found; for they may find a thing in Ireland; and when they find that he hath Assets, that is sufficient; and when they further say, in Ireland, it is idle and vain. It was therefore adjudged for the Plaintiff.

Debt against the Defendant as Executor of J. S. he pleaded *Fully Administred*, &c. and upon a special Verdict it was found, that J. S. made the Defendant his Executor, being then within

(r) Mich. 27 Eliz. in C. B. *Risley's Case*. Godbolt 29, 30. vid. Trin. 13 Jac. in C. B. *Foster and Jackson's Case*. Hob. 59, & 60. acc. vid. Mich. 15 El. Owen 36. adjudged acc.

(s) Mich. 27 El. in C. B. *Debt* and *Sir James's Strange's Case*. Owen 154.

(t) Trin. 12 El. in C. B. *Isaacs's Case* and *Lester's Case*. Leon. 155.

Trin. 7 Jac. B. Roll. Abridge. tit. Execut. lit. G.

Hill. 29 Eliz. *Craftman* vers. *Read*. Moo. Rep. nu. 263. Pasch. 5 Eliz. Moo. Rep. nu. 157.

Hill. 1 Jac. C. B. *Rickardson* vers. *Dowell*. Cro. Rep. par. 2. Pl. 28.

Mich. 27; & 28. Eliz. C. B. *Brightman* vers. *Reighley*. Cro. Rep. par. 3.

Age,

Age, and thereupon the Ordinary committed Administration to *A.* and *B.* who Administred; and they had in their hands when the Defendant came to his full Age, of the Goods of the Testators Six hundred pound, and the Defendant at his Age Proved the Will, and then released to *A.* and *B.* all Actions. And it was adjudged, that it was *Assets*. *Anderson* said, The doubt was, because it was uncertain what he released, and for that only an account lyeth; but here the certainty appeareth by the Verdict. And *Piriam* said, If an Executor doth release an account, and it is not certain what he shall recover, it is not *Assets*; but if it can appear or be Proved, that so much was due, it is *Assets*. For the Law presumeth he hath received so much as he doth release; and the Plaintiff had Judgement. *Nota*, *Rhodes* said, That in 17 *Eliz.* it was Ruled, that where one made his Last Will, and thereby willed, That none should have any dealing with his Goods until his Son came to the Age of Eighteen years, except *J. S.* that by this *J. S.* was Executor during the minority of the Son; and that it hath been adjudged, that when as one upon his death-bed said to his Wife, That *she shall pay all and take all*; by this she was Executrix.

Debt upon an Obligation against one as Executor of *A.* the Defendant pleads *plenem Administavit*, and issue thereupon; the Jury find a special Verdict, That *A.* made *E.* his Executrix, and died possessed of divers Goods, which *E.* made a fraudulent gift of all her Goods to *J. S. &c.* and continued in the possession of them, and took the Defendant to Husband and died; That the Defendant is possess'd of part of these Goods to the value of *&c.* and paid Legacies; and if those Goods should be found to be *Assets* in his hands, they found for the Plaintiff; and if *&c.* then for the Defendant. *Fenner* held that they should not be *Assets*, for although being but fraudulent, it shall be said to be a void Gift against the Donor and Creditor, and so lyable to his debt; yet it is good betwixt the Donor and Donee, and shall not be *Assets* in the hands of any but the Donor or Donee; but here the Husband is a meer Stranger thereto, wherefore *&c.* But all the other Justices *è contra*; for that by the Common Law (the Gift being fraudulent) they are lyable to the Plaintiffs Execution: And *Popham* said, If the Gift were good against all but Creditors (as it is) then they belong to the Donee, and in his hands are lyable to this debt; and if the Gift be void, they remain to the Executors of the Feme, and then the Baron having taken them and paid Legacies, is chargeable by reason thereof as Executor *de son tort demesne*; and so those Goods *quacunq; via data* are lyable to this debt in whosoever hands they come, unless by Title *Paramount*, or by Sale *bonâ fide*; wherefore it was adjudged for the Plaintiff.

Hill. 37 Eliz.
Wilcocke vers.
Waison, Cro. Rep.
par. 3.

Scire facias against S. as Executor of F. V. upon a Judgement given against the Testator of Two hundred pound, he pleaded payment of Forty pound debt due to the Queen, and besides that he had *riens in ses mains*. And thereupon they were at Issue, whether he had *Assets*? And it was found by special Verdict, That the Testator was possess'd of divers Goods, to the value of Two hundred & fifty pound, and by covin to defraud his Creditors, made a Gift of his Goods to his Daughter, with a condition of payment of twenty shillings, that it should be void, and died. The Defendant intermeddled with the Goods, and afterwards the Daughter by this Gift took the Goods; and after that Administration of the Goods of F. V. was committed to the Defendant; and whether upon this matter he shall be charged as Executor, and that those Goods should be *Assets* in his hands, was the question. And after Argument it was adjudged for the Plaintiff. For first, when he meddled with the Intestates Goods, although he were neither Executor nor Administrator, and afterwards Administration was committed unto him, a Creditor hath election to charge him as Executor or Administrator; especially here when he pleads as Executor, the finding by the Jury, that he is Administrator, is not to purpose, 9 Ed. 4. 53. 2 R. 3. 20. 21 H. 6. 8. Secondly, all the Court held, That this Gift of the Goods is in it self fraudulent, as appears by the Condition; and the Covin is expressly found by the Jury, and then it is utterly void against the Creditors, by the Stat. of 13 Eliz. and the Intestate died possessed of them; and when afterwards the Donee took them, it was a Trespass against the Administrator, for which he hath his remedy, and they are alwayes *Assets* in his hands. But if a Trespasser takes Goods from a Testator in his life-time, so as they never were but a *chose in Action* to the Executor or Administrator, they be not *Assets* until they be recovered: Wherefore notwithstanding the taking of them by the Donee, yet they alway remained as *Assets* in the hands of the Administrator, and therefore he is chargeable for them as Executor *de son tort*, by his intermeddling with them before Administration committed, and the Goods by Law remained alwayes in his possession. Wherefore it was adjudged for the Plaintiff.

Hill. 41 Eliz. Beckel ver. Stanhope, Cro. Rep. par. 3.

C H A P. XXV.

Additional to the three last precedent Chapters, touching how far and wherein Executors may be charged.

1. Executors not chargeable upon a simple Contract of the Testators.
2. Actions of Account lye not against the Executors of the Accountant.
3. Personal Actions lye not against Executors as Executors.
4. Executors lyable for no more than comes to their hands.
5. The Husband not lyable for his Wifes debts after her decease.
6. In what Case the Ordinary may be sued for the deceaseds debts.
7. How an Executor may make himself chargeable de bonis propriis.
8. The method of proceedings where Execution is de bonis propriis.
9. Executors obliged, though not mentioned in the Obligations.
10. Contracts dissolved by Obligations after made.

1. **V** Herever the Testator might wage his Law, there the Action lyeth not against the Executor; (a) therefore he is not chargeable upon an Action of Debt upon a simple Contract; yea, though such a debt grew for the most necessary things, as Meat and Drink, which bindeth even an Infant to payment, yet will it not charge the Executor of a man of full Age; so that though a common Host or Victualler trust his Guest, he loseth his debt by his death. (b) Understand these things of Contracts only by word; for where the Testator in his life-time did put his Seal to any Deed or Writing made upon any such thing, this being then more than a simple Contract, taketh from the Vendee his wager of Law, and thereby chargeth his Executor: But if the Testator Seal only unto a Tally or the like, with Scotchies, expressing a debt, this is no such specialty as shall charge his Executors, (c) And although no Action of debt lyeth against the Executor, as aforesaid, upon a simple Contract, yet may the Creditor in that Case maintain an Action upon the Case grounded upon the Assumption implied, though not express'd. (d) And thus indeed the Executor is charged in substance or matter for a simple Contract, though not in manner for a debt, but as for breach of promise, making recompence in damages instead of the debt.

2. No Action of Account lyeth against Executors, (except for the

(a) 41 E. 3. 15.
& 15 E. 4. 25.
Except for the
Kings Debtor by
a Quominous in
the Exchequer.
Co. lib. 9. fol. 58.
So of Accounts
except for the
King.

(b) Coke 9. fo. 87.
22 H. 4. 23. But
if the sum be
written on it,
they are bound as
by a Deed, 28 H.
8. Dyer 23. a.

(c) Offic. Exec.
of Contracts per-
sonal.

(d) Sanders Case.
Coke lib. 4. &
lib. 9. 87. Pin-
tious case.

the King) that is, against the Executors of the Accountant; (e) Nor indeed at the Common Law for the Executors of him to whom the Account is to be made; but that is help'd by Statute. (f) For Executors could not have an Action of Account at the Common Law in respect of the privacy of the Account; but the Stat. *W. 2. cap. 23.* hath given an Action of Account to Executors; the Stat. of *25 Ed. 3. cap. 5.* to Executors of Executors; and the Stat. of *31 Ed. 3. cap. 11.* to Administrators. (g) And as an Executor is not chargeable in an Action of Account as aforesaid; so neither is he chargeable in an Action of Detinue nor of Account (except to the King) for the Testators detaining and not paying or answering things received, or under his charge or custody.

3. Although Executors are in Law understood as the Representatives of their Testators persons, yet if the Testator in his life-time commit any Trespas either upon the Person, Lands or Goods of another, no Action lyeth against his Executor for the same; the reason is, *Actio personalis moritur cum persona*, as hath been formerly declared: Hence it is, that there is no remedy in Law to compel Executors, though they have Assets, to make satisfaction of a Trespas done by the Testator in his life-time; for every Trespas dyeth with the person. (b) And therefore also it is that no Action lyeth against the Executor of him who in his life-time carried away his Corn, Hay, &c. without setting forth the Tenth, and died before recovery had against him for the same, although during his life the treble value were recoverable against him in an Action of debt; and this holds true, though the Testator were a Lessee for years, so as his State came to his Executors. The Law is the same, and upon the foresaid Reason and Rule in Law, if a Lessee for years commit waste and die, no Action lyeth against his Executor for this waste. Yet the Law is otherwise against Executors of Ecclesiastical persons in case of Dilapidations; for if a Parson or Vicar do suffer the buildings of his Benefice to go to decay, and dies; his Executors are lyable by the Spiritual Law to the Successors Sute.

4. An Executor shall not be charged with, nor in respect of any other Goods than those which came to his hands after his taking upon him the charge of the Executorship, or by vertue thereof. And although the Executor of an Executor shall answer others to whom the first Testator was indebted, as much as he shall recover of the Goods of the first Testator; yet if that Executor did Alienate and Convert to his own use all the Goods which did belong to the former Testator; in this Case no Action doth lye against the Executor of the Executor for Recovery of any debts due by the first Testator. Likewise where A. makes B. Executor; and B.

(e) Co. sup. Littl. lib. 2. c. 3. Sect. 125.

(f) Rot. Parl. 50 E. 3. m. 123. Co. libid.

(g) Co. sup. Littl. lib. 2. cap. 5. Sect. 123.

(b) Dr. & Sta. lib. 2. cap. 10.

makes C. Executor, there the Goods which came from, or were left by A. be not in the hands of C. lyable unto the Judgements had against B. Nor on the other side, are the Goods of B. in the hands of C. subject to the Judgements had against A. And the like is to be understood of Statutes, Recognizances, and Bonds. Also by the Laws of this Land an Executor shall not be charged by any bequest made by his Testator of the Goods that did belong to another man. Indeed by the Civil Law it is otherwise, for there it is lawful for the Testator to bequeath another mans Goods, which the Heir at the Civil Law must buy, or pay the value thereof, if the Owner will not sell them.

5. If a Woman in debt marry, and dye before the debt be recovered against her, though leaving to her Husband much more than the value of the debt, yet is he not lyable in Law to pay one penny of her debts after her decease, because he neither is her Executor nor Administrator, nor came to her Goods by wrong.

(i) Ridl. View
of the Civil Law.
Part. 2. cap. 2.
Sect. 4.

(i) Inasmuch that a Woman indebted One thousand pound, and having Leases and other immoveable Goods to the value of Three or Four thousand pound marrying with A. B. and then dye before the debt be recovered against her; In this Case the Husband shall have all the value of his Wifes Estate, and yet in Law not be lyable for her debts; during her life he is lyable but not afterwards. (k) This seems a defect in the Law, whereby Creditors are at a loss without remedy; therefore let them sue in her life-time, for *Lex fit vigilantibus non dormientibus*.

(k) Offic. Exec.
c. 17. Sect. 1.

6. If a man be indebted and dye Intestate, or if the Executors of one who hath made a Will refuse to be Executors, whereby the Goods do come to the hands of the Ordinary, the Creditors may have a Writ of Debt against the Ordinary by the Stat. of *West. 2. cap. 19.* (l) and in this case he must be sued by the name of Ordinary. (m) But after Administration committed the Ordinary shall not be sued. (n)

(l) Fitzh. N. B.
120. D.
(m) 9 E. 4. 34.
(n) 8 Eliz. Dyer
247.

7. An Executor may make himself chargeable of his own proper Goods, either by *Omission* or by *Commission*; By *Omission*, as when he being sued upon an Obligation or the like, there being at the same time a Judgement in force against him or the deceased, and hath but just enough in his hands to satisfy that Judgement, yet doth not plead this in Bar of the present Action, but suffers the Plaintiff to recover against him; in this Case he must satisfy the second debt out of his own Estate: Or by *Commission*, as when he doth something that is a Waste in him, and thereupon a *Devastavit* is return'd against him, in which case he must answer as much as he wasted out of his own Estate; or when a sute being against him, he pleads such a false Plea therein as tends to the perpetual Bar of the Plaintiffs Action, and yet being of a thing within his

his certain knowledge; as when he pleads he is not Executor, nor ever Administred as Executor; and upon tryal of this issue it be found against him, that he is a lawful Executor, or Executor in his own wrong; in this Case he must satisfy the debt out of his own Estate, whether he hath Assets or not, and the Execution had upon the Judgement shall be levied upon his own proper Goods.

(o) Likewise, if an Executor or Administrator sued doth plead to the Action *Plenè Administravit*, and upon Tryal it be found against him; in this Case if he have any of the deceaseds Goods left in his hands, the Execution shall be of them; but if he have none such, then the Execution shall be, and he shall be charged for so much as is found to the value thereof to be in his hands, of his own proper Goods: But where one is sued upon a Promise made by the Testator, and he plead *Non Assumpsit* to it; or where he is sued upon a Deed made by the Testator, and he plead *Non est factum* to it, or the like; and these issues upon Tryal are found against him; or when he shall confess the Action, or suffer a Judgement to pass by default against him, or plead any vain Plea; In all these Cases he shall not be chargeable of his own Estate, neither shall the Judgement and Execution in these Cases be *de bonis Propriis*, but *de bonis Testatoris* only for the Debt, and *de bonis Propriis* for the Costs. And yet if an Executor or Administrator shall intreat a Creditor to forbear his debt, until a day, and then promise to pay him; by this promise he hath made himself chargeable as for his own debt, howbeit it shall be allowed him upon his account. And if a debt be recovered against one who dieth before Execution sued, leaving Goods sufficient to satisfy; then shall not the Land descended to the Heir be charged therewith, nor by like reason any Land conveyed after Judgement. Or if a Creditor be made Executor by his Debtor, and pay himself part out of the Goods, he cannot sue the Heir for the rest, because the debt cannot be apportioned, but otherwise he may. (p)

8. In all Cases where a man is charged of his own Estate, and the Execution be *de bonis Propriis*, the Judgement is ever *de bonis Testatoris*. And the method or form of proceedings in such cases, is this, *viz.* The first Execution is against the Executor *de bonis Testatoris*, and not *de bonis Propriis*: And after a *Devastavit* return'd by the Sheriff, and not before, against the Executor or Administrator, a new Execution is directed to the Sheriff to levy the debt *de bonis Testatoris*; and if there be none of them to be found in his hands, then to levy them *de bonis Propriis Executoris vel Administratoris*: Therefore if an Executor or Administrator be sued by a Creditor, and the Executor or Administrator plead a *Plenè Administravit* generally, or plead specially that he hath no more but to satisfy a Judgement or the like; and upon tryal this issue be found

(o) 2 H. 6. 13.
Dyer 183. 80.
Coke 9. 90. 94.
9 H. 6. 57. 24 H.
6. 45. Broo. Exec.
141. 105. Littl.
Broo. Sed. 29.
Kelw. 61. Broo.
Exec. 164.

(p) Offic. Exec.
pag. 142.

against him, and that he hath in all, or in part, enough to satisfy the debt; In these Cases the Judgement is *de bonis Testatoris*, and thereupon an Execution is as in other cases to levy the debt *de bonis Testatoris* in the hands of the Executor or Administrator, and the Costs *de bonis Propriis*. And upon the Return of the Sheriff a special Execution doth issue forth to levy the money *de bonis Testatoris*: And if it appear that he hath wasted the Goods, then that he shall satisfy the Execution *de bonis Propriis*. And hereupon also the Plaintiff may, if he please, have a *Capias* against the Body, or an *Elegit* against the Lands of the Executor or Administrator; and other course of Proceedings cannot, nor may be had in this Case against the Executor or Administrator. (q) But a Sute Commenced against an Executor as Administrator, or against an Administrator as Executor will prove invalid; for neither the one nor the other is chargeable with the payment of Debts or Legacies in such an Erroneous Sute. But where an Action of Debt was brought against Two Executors, whereof the one appeared and confessed the Action, the other making default; thereupon Judgement was given to Recover against them both *de bonis Testatoris* in their hands, and Execution accordingly. : And upon this Execution the Sheriff returned a *Devastavit* against that Executor only that made default, and hereupon a *Scire Facias* went out against him alone, and afterwards an Execution against him alone *de bonis Propriis*. (r) And in a *Fieri Facias* upon a Recovery against Executors the Sheriff Returning a *Devastaverunt*, a Writ of Execution issues against the deceaseds Goods, and if there were none such, then against the Executors Goods. (s)

9. If one by Bond or Covenant oblige himself to pay such a sum of money at such a day, not mentioning his Executors at all, yet is the Executor also bound as included in the Name or Person of the Testator. For if a man bindeth himself, his Executors are also bound, though they be not named in the Bond; but so it is not of the Heir. (t) And in this respect the Executor doth more actually represent the person of the Testator, than the Heir doth the person of the Ancestor. So that every Bond or Covenant by the Testator made for payment of money or the like, though he doth not Covenant for, nor bind Himself and his Executors by express words, reacheth unto his Executor also, although he be not named. And yet the Heir is not bound if he be not expressly named by the word Heir, though there be never so great Assets or Land descended to him. And although Executors do so represent their Testators persons that they stand lyable for their Debts though not mentioned in the Bonds; yet where a man is bound that he will not sue upon such a Bond, and dies, if his Executors afterwards sue, this is held to be no forfeiture of the Bond.

(q) Atworths Case. Mich. 38, 39 Eliz. 34 H. 6. 45. 46 Ed. 3. 9. Fitzh. Executor. 9. Coke 5. 32. 8. 124. Dyer 185. 32.

(r) Brownl. Rep. 24. part. 24. 32. 50. 76. 78. 116. 2. part. 187. & Dyer 210. (s) 11 H. 4. 70.

(t) Co. sup. Littl. lib. 3. c. 5. Sect. 337. in fin.

28 H. 8. Dyer 14. 2. 12.

Bond. (*) So where one is bound to pay Ten pounds within a moneth after Request made to him, and he dies before Request made, it sufficeth not to make it to the Executor. (w) And although in a Judgment had against a Testator in his life-time, no mention be made of his Executors, yet are they lyable in that case; for to debts upon Record, and to debts and dammages already recovered against the Testator, and to debts by recognizance, the Executor is lyable though he be not named. So likewise do Executors stand charged with other inferiour debts upon Record, as Issues forfeited, Fines imposed by Justices at *Westminster*, or at Assizes, Quarter-Sessions, Commissioners of Sewers, and the like.

10. An Obligation made after a Contract dissolveth the Contract. So that if a man do make a Contract to pay certain money for a thing bought by him, if he make an Obligation for the money, the Contract is discharged, and he shall not have an Action of Debt upon the Contract. (*) And therefore if A. and B. do bargain with C. to pay him One hundred pound for Corn or other things, and afterwards C. taketh some Writing Obligatory of A. only, and then B. dieth; in this Case the Executors of B. are discharged, because they stood charged only by the Contract, which is extinguished by the said Specialty; for such writing Obligatory doth determine or drown any duty by a meer Contract, because Specialty is of a higher nature. And although an Executor not named in the Obligation be notwithstanding bound, as aforesaid, supposing also that he that is named in the Testament, hath in due form Proved the same, yet is he not thereby lyable or obliged to satisfie the Creditors of the deceased, as one that hath Administred, unless also he hath paid the Fees due for the same out of the Goods of the deceased.

It was Adjuded, that if an Executor pay a debt of his Testators with his own proper Goods, he may retain as much in value of the Testators Goods. And 6 Ed. 6. in debt by *Shelley* vers. *Sackville* Executor of *H. Brown*, he pleaded *Plene Administravit*, and upon Evidence the Plaintiff shewed, That the Defendant had a Farm belonging to the Testator in his hands to the value of Two hundred Marks; the Defendant shewed how he had expended Two hundred Marks in payment of the Testators debts: And the Question upon the Evidence was, whether the Defendants Plea was receivable? And upon Consultation with the Justices of B. R. it shall be received to maintain the Issue of *Fully Administred* for so much as it amounted unto, because to make such a Retainer and Deduction, as to alter the property, is one and the same.

F. H. Executrix of F. brought *Detinue* of Goods against A. The Case was, F. had made a will in writing, and thereby given many Legacies, and at the end of his Will gave the Residue of his

(*) Offic. Exec.
p. 156. 27 H. 8.
16.

(w) Ibid. & *Mans-
wood*. 155. & 26
Elix.

(*) 9 E. 4. 25.
28 H. 6. 4. 21 H.
7. 5. 1 H. 6. 8.
per Bab. 20 H. 6.
23.

Hill. 10 H. 8.
Cleydon vers.
Spencer. *Moo.*
Rep. nu. 3.

Mich. 15. & 16.
Elix. *Hanks* vers.
Alborough. *Moo.*
Rep. nu. 242.

his Goods to F. his Wife, whom he made his sole Executrix, for the payment of his debts, and to dispose thereof for the wealth of his Soul. F. the Wife after takes H. to Husband, who made A. the Defendant his Executor, and died; and against A. doth F. H. bring *Detinue* for the Goods of F. And it was adjudged for the Plaintiff, because F. H. doth not here take the Residue of the Goods as a Devisee or Legatee, but as Executrix, by reason of these words, *viz.* [for the payment of his debts, and for the wealth of his Soul.] And the Justices held, That all works of Charity were within the Intent.

C H A P. XXVI.

Of a Devastavit or Wast in an Executor or Administrator.

1. *What a Devastavit or Wast is; and in what Case the Writ of Devastaverunt doth lye.*
2. *How many wayes a Devastavit or Wast may be committed.*
3. *An Executor or Administrator in a Devastavit or Wast is chargeable de bonis Propriis.*
4. *What Acts do not amount to a Wast; also a Wast committed by one Co-Executor shall not charge another.*
5. *The manner of Proceedings against Executors or Administrators in case of a Devastavit.*

1. **A** Devastavit or Wast in the Executor or Administrator is when he doth mis-administer the Goods and Chattels of the deceased, or mis-manage that Trust which is reposed in him, either by the Testator as to the Executor, or by the Law as to the Administrator; and therefore the Writ of *Devastaverunt bona Testatoris* lyeth against Executors for paying Legacies or Debts without Specialties, to the prejudice of Creditors that have Specialties, before the debts upon the said Specialties be due. For in this Case the Executors are as lyable to an Action as if they had wasted the Goods of the Testator riotously or without cause. (a) Likewise, the said Writ lyeth against Executors or Administrators, when they deliver the Legacies given by the Testator, or make Restitution for wrongs done by him, or pay his debts due upon Contracts, or other debts upon Specialties, whose dayes of payment are not yet come, &c. and keep not sufficient in their hands to discharge those Debts upon Record or Specialties, which they are compellable formerly by Law to satisfie; or do deviate from that method or order enjoyned Executors by the Law in the payment of Debts and

(a) *Cozels Inter-
prator. verb. De-
vastaverunt.*

and Legacies; In such Cases they shall be constrained to pay of their own Goods those Duties, which at the first by the Law they were compellable to pay, according to the value of that which they delivered, or paid by compulsion; for such payment of Debts or delivery of Legacies as is aforesaid, before Debts upon Record, or Specialties, whose dayes of payment are already come, are accounted in the Law a wasting of the Goods of the deceased, as much as if they had given them away without cause, or sold them, and converted them to their own use. (b)

(b) *Terms of Law*, verb. *Devastaverunt*.

2. From the Premises it is evident, that a *Devastavit* or *Wast* may be committed several ways; more particularly thus, viz. When more is expended about the Funerals of the deceased, with respect had to his Estate and degree, than is meet and fit; when Executors pay Legacies in money, or assent to Legacies given in other things, before the Debts are paid, not reserving sufficient to pay the Debts also; when the Debts are not paid in that order and manner as the Law requires, but payment is made of that first which should be paid last, when there is not sufficient to pay all; when the Executor gives a Release of a Debt or Duty due to the deceased before his Receipt thereof; when he Releases an Action, whereby he might recover the deceaseds Goods, or the value thereof; when he sells the deceaseds Goods much under value, specially if in a fraudulent way, as to his near friends, to his own use, or to have money under hand, or the like. (c) But be the apprezement what it will, and let the Testator sell for what he will, he shall stand chargeable to the best and utmost value towards the Creditors; but a Sheriffs sale of the Testators Goods upon an Execution at an under-value is no wast in the Executor. (d) If an Executor upon a Bond of Two hundred pound forfeited for non-payment of One hundred pound, accept the Principal, or Cost, or Damage, and give a Release or Acquittance of the whole forfeited Bond, or of all Actions, or upon Record acknowledge satisfaction upon Judgement had; this shall be a *Devastavit* or *Wasting* of so much as the penal sum is more than is received by him, and so far his own Goods stand lyable to Creditors not satisfied. (e) And so doubtless is it, if he do but give up the Bond, having no Judgement upon it, though he neither make a Release, nor acknowledge satisfaction. The Law is the same in Case of releasing of Trespases, or other causes of Action; As if one take away Goods from the Testator or his Executor, and he give a Release; this is a *Wast* and makes his own Goods lyable: Yet on the other side, if an Executor by payment of Two hundred and forty pound or thereabouts, get in a forfeited Bond of Five hundred pound, it shall be an Administration but of Two hundred and forty pound, or of no more than he really paid. (f) Also the Exe-

(c) *Plowd.* 343. *Coke* 5. 32. *Dr. & Stu.* 71. *Perkins* Sect. 438. 570. *Kelway* 59.

(d) *Offic. Exec.* p. 246.

(e) 13 *Ed. 2.* *Fitzh.* 91. *Whether the Executors or Administrators of the wasting Executor dying before he hath answered for the Wast shall be charged.* *Q. Offic. Exec.* p. 253.

(f) 27 *H. 2.* 6. p. *Fitzh.*

CUTORS.

It is a Devastavit in Executors to pay an Usurycum Bond; in Winchcomb and the Bishop of Winchester's Case, Hob. 167. (g) Offic. Exec. p. 248.

(b) Temp. Eliz. in Cas. int. Hankford & Mesford.

(i) Offic. Exec. ubi supra.

(k) Brownl. Rep. part. 2. in Cas. Lawry against Aldred and Edmunds; and as in 10 Ed. 3. 503. a. (l) Brownl. part. 2. Casus in Law.

(m) Dyer 185. Co. 5. 32. Old B. of Entries 11. & Dyer 210. Dr. & Sta. 78. and so held in 12 H. 7. and in Cas. inter Walter and Saiton. in Con. Pl. Temp. El. and in Cas. int. Hankford and Mesford. Tem. El. & 4th. Ent. 101. fol. 227. Kelw. Rep. fol. 23. & 11 H. 6. 38. a. 4 El. Dy. 210. a. The Writ so Issued against the Waster only. P. 4 H. 8. Rot. 301. Tr. 24 El. & Pasch. 36 Eliz. Offic. Ex. p. 252.

cutors verbal agreement to require or sue for no more, or his giving a Receipt for so much as he hath received, or delivering of the Bond into a Friends hands, or into a Court of Equity by way of Security to the Debtor that he shall not be sued for more, is no Devastation or Waste, since that the rest in Law still remains as due and suable. (g) And upon the Issue of *Plene Administravit* the Jury is to find whether the Executor hath Assets or not, and not whether a Devastation, for that must come in by the Sheriffs Return upon the *Fieri Facias*. (b) Again, the Executors submitting to Arbitrement matters of Debt or Duty due to the Testator, or touching his Goods taken away, is another way of discharging dangerous to Executors; for if it happen that by the Arbitrators Award the Trespassers or Debtors be discharged without full Recompence made, the rest of the value will subject the Executors to the Creditors, because it was their own voluntary act to submit to Arbitrators. (i) Or if an Executor allow a Writ to suffer Judgement to be had against him, upon a Writ which is abatable, he shall not have allowance of that, but this shall be Return'd as a *Devastavit*. (k) Yea, if money be paid by an Executor upon an usurious Contract, it is a *Devastavit*. And it was held by the Lord Hobard, That if an Executor pay a Bond made upon an usurious Contract, it shall be a *Devastavit* or *Waste* in the Executor. (l)

3. These and the like Acts are said to be a *Devastavit* or *Waste* in the Executor or Administrator; which being discovered against him by the Sheriffs Return will charge him *de bonis Propriis* for so much as he hath so mis-administred; insomuch that any Creditor may charge him for the Debt due to him from the Testator, as for his own proper Debt, and for so much Execution shall be made against him upon his own Body, Lands and Goods. Yea, the Husband shall be charged in a *Devastavit* for the *Waste* of himself or his Wife, where she is an Executrix, whilst they both live; but after her death it may be otherwise: yea, and if a void Administration happen to be committed, and the Administrator waste the Goods, and then Administration be committed to another; in this case the former Administrator may be charged by the Creditors for the waste done in his time.

4. But for an Executor or Administrator without fraud to sell the Goods of the deceased under value, especially where more cannot conveniently be made of them, is no waste. Nor shall one Executor or Administrator be charged for the waste done by another; for where there are many joynt-Executors, if only one of them doth commit the waste, he alone shall suffer for it. (m) So the Executor or Administrator committing Waste in the Gift or Sale of any of the Goods of the Defunct, shall answer it alone, and not he to whom the Goods are so given or sold; yet the Executor

cutor or Administrator of such an Executor or Administrator shall not be question'd for it after his death. Also an Executor or Administrator may lawfully sell or convert the deceaseds Goods to his own use, so as he convert the money thereof to the deceaseds use in payment of Debts or the like, and pay so much of his own money as the Goods so converted to his use are worth; and this shall not be imputed to him as a Waste. Yea, he may sell any special Legacy that is bequeathed, and even this shall be no Waste in him, though it be a wrong to the Legatee, in case there be Assets to pay Debts besides: But when he hath enough to pay all the Debts and Legacies, then he may dispose of the whole Estate how he please without any prejudice to himself or others. (n) And note, That the wasting Executor doth not incur damage, or make his own Goods lyable for satisfaction for the Waste, further than the value of the Testators Goods so wasted or mis-administrated doth amount unto. An Action of Debt was brought against Two Executors; one appeared and confessed the Action, the other made default; and Judgement was given to recover *de bonis Testatoris* in both their hands; whereupon a *Scire Facias* issued. The Sheriff returned *Nihil*; but he who made default had wasted the Goods, upon which a *Scire Feci* issued against him who had wasted the Goods, and upon Return of the *Scire Feci*, Execution was awarded, of his own proper Goods only, without his Co-Executor.

(n) Browl. Rep.
1. part. 24. 13.
110. 2. part. 8r.

Vid. 4 Eliz. Dyer
210.

5. If the Executor confess he hath Assets, supposing the Executor to be Defendant, then may the Sheriff Return a *Devastavit*. (o) If the cause of Action be against Executors or Administrators, the Judgement is to recover the Debt and Damages of the Testators Goods, if the Executor hath so much in his hands; and if he hath not, then the Damages (as was formerly shewn) of the Executors or Administrators own Goods. And if the Sheriff upon a *Scire Facias* Return a *Devastavit*, then a *Fieri Facias* or *Elegit* may be sued out to levy the Debt and Damages of the Executors or Administrators proper Goods. And if the Executor plead, That he never was Executor nor Administrated as Executor, and it be found against him that he had Administrated but one penny, the Judgement shall be to recover the Debt and Damages of the Executors own Goods. And in a Case of Debt brought upon a Record, the Execution shall be brought where the Record remains. (p)

(o) Browl. Rep.
part. 2. in *Cof.*
Morgan vers.
Sock, Pasch.
10 Jac.

(p) Browl. Rep.
in *Cof. Green*
vers. *Wilcox*.
Trin. 44 Eliz.

Judgement was given against B. in a debt of One hundred pound in C. B. After the said Judgement he entered into a Statute to J. S. and died Intestate; his Wife takes Letters of Administration, and removes the Record of the said Debt recovered against her Husband into B. R. by Error; depending the Sute she payes the

45 Eliz. B. R.
Read & Bear.
Locky Case. Yels.

Debt due upon the Statute to *J. S.* Afterwards the former Judgement is affirmed. On a *Scire Facias* against the Administratrix to have Execution, she pleaded payment of the said Statute, beyond which she had not Assets. Upon this the Justices of the *Kings Bench* were divided, viz. *Popham* and *Gandy* against *Fenner* and *Telverton*. It was referred to the Opinion of the other Justices; they joyned in Opinion with *Fenner* and *Telverton*, and judged it a good Plea, and that the paying of the Statute was no *Devastavit*; for at the time of the Execution of the Statute she could not plead the Judgement of *C. B.* it being then doubtful whether it would be affirmed or not; therefore no default in the Wife-Administratrix in paying and discharging the Statute; for she could not have an *Audita Querela*, nor any other Remedy to be freed from payment of the Statute, at the time of the Execution thereof.

C H A P. XXVII.

Of the Executors power in Sale of Lands devised to be sold.

1. The difference between a Devise, that the Executors shall sell the Land; and a Devise of the Land to the Executors to be sold.
2. The profits of Land Devised to be sold are not Assets in the Executors hands for a time before such Sale.
3. In what Case the Heir may or may not enter upon unsold Lands devised to be sold.
4. Executors accepting may without others Refusing, make a good Sale of Lands devised to be sold.
5. In what Case surviving Executors cannot sell Lands devised to be sold.

1. **W**HERE Land is by Will appointed to be sold, neither the money raised, nor the profits shall be accounted as any of the Testators Goods or Chattels. (a) And when a man deviseth, that his Executors shall sell the Land, there the Land in the mean time descends to the Heir; (b) and until the Sale be made the Heir may enter and take the Profits. (c) But when the Land is Devised to his Executors to be sold, there the Devise taketh away the Descent, and vesteth the State of the Land in the Executors, and they may Enter and take the profits, and make sale according to the Devise. (d) Also when a man deviseth his Land to be sold by his Executors, it is all one as if he had devised his Land to his Executors to be sold, because he then likewise deviseth

(a) Statut. H. 8.
cap. 5.

(b) Perk. tit. De-
vises, fol. 104,
105.

(c) Ibid. & Broo.
Abridg. tit. De-
vise, nu. 19.

(d) Kelw. Rep.
fol. 107, 108.
nu. 25.

devise the Land whereby he breaketh the Descent.

2. If a Testator doth appoint by his Will his Executors to make sale of certain Lands for the use and behoof of the said Testator, and the Lands after the Testators decease happen to remain some time unsold, the Profits thereof in the said time before such sale made shall not be Assets in the Executors hands, unless the Testator did devise, That the mean Profits till the Sale should be Assets in their hands; for otherwise they shall not be so, though the Executors in this Case have no Estate or Interest in the Land, but only a bare and naked Power and Authority. (e)

(e) Cok. Inst. lib. 2. cap. 10. Sect. 169. & lib. 3. cap. 5. Sect. 383.

3. But if the Executors having power to sell the Land of the Testator, defer the Sale thereof after the offer of a reasonable price, converting the Profits thereof to their own use, the Heir may lawfully Enter to the Land, and put out the Executors (f) if they have no further Authority or Interest than only to sell the Land and distribute the money, for then the Frank-Tenement doth descend to the Heir, (g) and the Executors are bound to perform the Devise in convenient time: But if the money for the same be to be distributed *in pios usus*, then the Frank-Tenement is in the Executors after the death of the Testator, and not in the Heir. (h) So that in such Case he may not Enter as in the former. Yea, if Lands Devise to be sold be not accordingly so done by the Executors, the Law will then enforce them to sell the Lands so soon as they can, because the mean Profits in that Case taken before Sale are not Assets to charge the Executors as compellable to pay debts of the same: But if a man Devise, that his Executors shall sell his Land, there they may sell it at any time, for that they have but a bare and naked Power and no Profit.

(f) Dyer fol. 371. nu. 3. Fulbeck Paral. lib. 1. fo. 41.

(g) Kelw. ubi supra.

(h) Ibid. Kelw.

4. If many Executors be named in a Will, wherein Power is given to them to sell Land for any purpose; and some of these Executors refuse the Executorship: In this Case the other Executors who stand to the Will, may dispose and sell the Land without the consent of the other who so refused the Executorship. (i) But Note, That an Executors Executor cannot sell the Land of the first Testator (who by his Will gave Power to his Executor to sell the same) unless there be a Co-Executor surviving.

(i) St. Fr. 8. & Swinsb. part 6. c. 3. nu. 7.

5. Although the surviving Executor may sell the Land which a Testator doth bequeath to his Executors to be Sold, because as the State so the Trust shall survive; yet in case the Executors in that part of the Will impowering them to Sell be particularly Named, each by his particular Name, and one of them refuse and dye before Sale made, then the Survivors cannot sell the same, (k) because the words of the Testator (one of the Executors refusing or being dead) cannot be satisfied, unless the Testator express in his Will a Power to the Survivors or Survi-

(k) Coke Inst. lib. 2. c. 10. Sect. 169.

vor of them, or to such or so many of them as take upon them the Probate of the Will; without which words (the Executors being particularly Named) it is otherwise: But if the Land to be Sold be left to his Executors generally, not particularizing their Names, then Sale made by some of them only, in this Case is good; for that now by the Statute of 21 H. 8. cap. 4. it is Provided, That where Lands be Willed to be sold by Executors, though part of them refuse, yet the residue may sell. But here Note, That they may not sell to him that so refused, because he is yet a party, and privy to the Last Will, and remains an Executor still so long as any Co-Executor lives. For it was the Opinion of the &c.

Tr. 27 H. 8. *Anderson*, Rep. Cas 52.

Note, that by the Opinion of the Justices, if a man makes his Last Will, and Wills that his Executors shall sell his Land, and Devises his Land to his Executors to be sold, and one of the Executors refuse the Administration of the Testators Goods before the Ordinary, the other Executors cannot sell the said Land to the Executor so refusing the Administration, by the Statute 21 H. 8. cap. 4. For that Executor notwithstanding such his refusal is still a party, and privy to the said Testament, and is one of the Executors at his pleasure.

Hill. 25 Eliz. *Vincent* ver*l.* *Lee*.
Moo. Rep. n. 291.

It was adjudged in *B. R.* between *Vincent* and *Lee*, where a man devised, That his Sons in Law should sell the Reversion of his Land, without mentioning their particular Names; if some of them dye, that the others may sell.

Tr. or Hill. 25
Eliz. Mich. 28, &
29 Eliz. C. B.
Townsend ver*l.*
Wale. Cro. Rep.
par. 3. Pl. 54.

Upon a special Verdict, the Case was; A man seised of Lands in Possession, and of other Lands in Reversion, upon an Estate for life, Deviseeth by his Will in writing, That his Executors should have all his Lands Free and Customary in *D.* for Ten Years to perform his Will, and the Will of his Father, with the Profits thereof; and that after the Ten Years, his Executors or any of them should sell it for the payment of his Debts. He makes Three Executors and dies: The one dies, the Ten Years expire, Tenant for Life dies; the Two surviving Executors sell the Land, &c. *Spurling*. This Sale is not good: (1.) The Reversion of the Estate for Life passed not, because he had other Lands there to satisfy the words, and it was not his intent to pass it, because there were not any Profits to be taken thereby. (2.) The Sale by the Two surviving Executors is not good, for it ought to have been by all, or by one of them only. But the Court resolved to the contrary in both; wherefore it was adjudged accordingly.

Hill. 25 Eliz.
Townsend and
Wale's Case. *Anderson*.
Rep. par. 2.
Cas 44.

The same Case is Reported by *Anderson*, thus; viz. *J. T.* brought *Ejectione Firme* against *J. W.* and others. The Defendants pleaded *Non Culp.* whereupon Special Verdict was given.

given, the which in effect was, That one *Smith* being seised of Twenty Acres of Land, made a Lease thereof to one for Life; and being also seised of Sixty other Acres, made his Will in manner following, viz. *I Will and Charge my Executors, and every of them, to fulfill my Fathers Will, and this my Last Will;* (in which were divers Legacies) *In Consideration whereof I give all my Lands and Tenements to my Executors, and they to take the Profits thereof by the space of Ten Years; and these Ten Years ended, I will the same to be sold by my said Executors, or by one of them.* And made Three Executors, and died; after the Tenant for life died; one of the Executors died also. The Two Executors Enter on the Sixty Acres, and receive the Profits thereof for Ten Years, but Entered not on the Twenty Acres; but after the Ten Years ended the surviving Executors sold the Twenty Acres to *J. H.* who Entered and Leased the same, whereon the Action is brought. It was said, That the Executors did not Sell; but it was adjudged, that the surviving Executors might Sell; For it appeared that the Intention of the Testator was, That the Land should be sold for the performance of his Will, which the surviving Executors might Execute, and consequently do what the Testator appointed in order thereunto.

C H A P. XXVIII.

Of Debts, Legacies, and Mortuaries, and the Executors method in the payment thereof.

1. Debts to be paid before Legacies.
2. The Executor may pay himself first.
3. What Debts to the Crown shall have priority of payment before Debts to the Subject.
4. Judgements upon Record to be satisfied next after the Debts due to the Crown.
5. Next after Judgements upon Record, Debts by Statutes, or Recognizances, are payable before meer Personal Debts.
6. After Statutes and Recognizances, Debts due by Obligations or penal or single Bills are to have the next precedency in payment.
7. Debts upon Specialties, Bonds and Bills are to be satisfied before Debts upon a simple Contract.
8. After Obligations Debts due upon simple Bills, Merchants Books, and other Specialties are to be paid.
9. Touching Debts due for Rent upon Leases, what the Law in that Case is.
10. Debts for Servants wages payable before Legacies.
11. Covin in an Executors payments shall not prejudice a Creditor.
12. Mortuary, what it is; when, where, how much, and in what Cases payable.
13. Law-Cases relating to this Subject.

1. **A**Ll the Debts must be paid before any Legacies be paid or delivered, and if there be not enough (over and above the Legacies) to pay all the debts, then and in that Case any thing given by way of Legacy may be sold for payment of the Debts; and in such Case the Legataries must be content to lose their Legacies.

2. In the first place the Executor or the Administrator, if he be a Creditor to the deceased, shall be preferred before others; so that he may deduct to satisfy himself first, although other Creditors lose their whole debt thereby, specially if his debt be in equal degree with the other debts; so that an Executor may allow his own debt in prejudice of other like Creditors, (a) if he hath made an Inventory, and in case he be not Executor of his own wrong. (b) Understand this especially when the debts are of equal degree, for if the Testator be indebted to other men by Statute,

(a) Plowd. in
Caf. Inter Wood-
ward and Dorey.
(b) Co. Rep. lib.
25. fol. 30.

tute, Judgement, or Recognizance, and to the Executor only by Bond or Specialty, then may he not first pay himself, unless there be Goods sufficient to pay both him and them. But by the Civil and Ecclesiastical Laws the Executor is in the same case with other like Creditors. (c)

3. If there be any debt due to the Crown, and the King Commence his Sute for it before any other man can get a Judgement for his debt, he shall be satisfied before any others; neither is it in the Election of the Executor to prefer any other debt due to any Subject. (d) So that if the Executor be Sued by any Subject for any such debt, he may plead in Bar of the Sute, That his Testator died thus much in debt to the King, shewing how, &c. and that he hath not Goods surmounting the value of that debt. (e) And if the Sute be not so by way of Action, as that the Executor hath a day in Court to plead, but be by way of suing Execution, as upon Stat. Merchant or Staple, then is the Executor put to his *Audita Querela*, wherein he must set forth this matter: But this priority of payment of the Kings debt before any other, is to be understood of such of the Kings debts only as are of Record, and not of summs of money due to the King upon Wood-sales, or Sales of his Minerals, for which no Specialty is given, or of Amercements in his Courts Baron, or Courts of his Honours, which be not Courts of Record, or of Fines for Copy-hold Estates there, or of mony upon the Sale of Straves within the Kings Mannors or Liberties, or of forfeitures to the Crown of debts by Contract, due to any Subject, by Out-lawry or Attainder, until Office thereupon found. (f) But of Fines and Amercements in the Kings Courts of Record, there is no question but they are debts of Record.

4. When the King is satisfied, then must the debts of the Subject be paid, (g) if there be Goods of the deceased sufficient remaining, and that in this order or method. First, before other personal debts, whether they be due by Obligation, Bill, or otherwise, Judgements and Condemnations are to be discharged; that is, the debts due by Record, by any Judgement had against the deceased in any Judicial proceeding in any Court of Record. (h) Nor is it any Plea for a Creditor by Statute to say that his Statute was acknowledged before the Judgement, and so is more ancient; for a Judgement though latter, yet being more puiſne, is to be preferred before a Statute in time precedent: But if this Judgement be satisfied, and is only kept on foot to wrong other Creditors, or if there be any Defeazance of the Judgement yet in force, then the Judgement will not avail to keep off other Creditors from their debts. (i) And here Note, that between one Judgement and another had against the Testator, precedency or priority of time is

NOT

(c) 1. Scimus. 6. in computatione. Cod. de jure Deliber. & C. Stat. 6. Statuimus de Test. lib. 3. Prov. Const. Cant.

(d) Magn. Chart. c. 18.

(e) M. 33, & 34 Eliz. *The Lady Walsingham's Case*, in Com. B. & Trin. 39 Eliz.

(f) Office, Exec. cap. 12, p. 206, &c.

(g) Co. 2. 82. Plow. 184. 145. Dyer 80. Dr. & Stu. 75. 79. 132. 33 H. 8. 39. Co. 5. 28. 4. 54. 59. 60. 8. 132. Dyer 232. 32. 21 E. 4. 21. & Broo. Exec. 88. 172. Co. 8. 132. Dy. 32. Plow. 279. 280. Broo. Exec. 103. Kelw. 74. Brow. Rep. part. 1. 73. 53. 76. 77. 80. 104. 103. 2 part. 31. 82. 37. (h) Broo. Exec. nu. 172. Dr. & Stu. lib. 2. cap. 10. D. Coke. lib. 4. fol. 60. (i) Co. 1. 5. fol. 28. & 1. 2. 6. 132. 2.

not material, but he that first sueth Execution shall be preferred, and before any Execution sued it is at the Election of the Executor to satisfy which Judgement he will first. (k) And here observe farther, that this is to be understood of Judgements only against the Testator, and not of any against the Executor himself; also, that what is said of a Testator in Case of an Executor immediate, is to be understood likewise of the Testators Testator in Case of the Executor of an Executor. Again, the foresaid respect to debt by Judgement is not to be restrained or limited, only to the Four Courts at *Westminster*, but extends it self to Judgement in all other Courts of Record, as in Cities and Towns Corporate, having Power by Charter or Prescription to hold Plea of Debt above Forty shillings; for though Execution cannot be there had of any other Goods than such as are within the Jurisdiction of that Court, yet if the Record be removed into Chancery by a *Certiorari*, and thence by *Mittimus* into one of the Benches, then Execution may be had upon any Goods in any County of *England*.

Again, Debts upon Specialties must be paid before debts upon Contract, (l) and debts upon Record must be paid before debts upon Specialties; also a Judgement in a Court of Record shall be paid before Statutes, which are but private Records, as also before Recognizances acknowledged by Assent of the parties. Likewise a debt upon or after a Recovery, though it be a latter debt, shall be paid before a precedent debt due by Recognizance or Statute, because although they are both Records, yet the Judgement in the Kings Court, upon Judicial proceeding, is the most notorious and more eminent in degree than a Statute or Recognizance taken in private by consent of the parties, and therefore shall be preferred before it. (m)

(k) Mich. 32 El. in *C. B. Pemberton and Barbours Case*, & Co. 4 part. *The Case of the Warden and Commonalty of Sadlers*.

(l) Coke 5. 91. *Seamant Case*; Execution against an Executor upon a Statute; & 1. 205 Cod. *Qui prioriores in pignore*.

(m) An. 13 Ed. 1.

5. In the next place, Debts due by Statutes or Recognizances entered into by the deceased are to be satisfied; for the debt due upon Statute Merchant and Recognizance is to be discharged, (if there be Assets) before any Personal Debt; (n) For that by virtue of the Recognizance, not only the person of the Debtor is obliged, but also after the expiration of the day of payment, the moveable Goods of the Debtor may be apprehended, and sold for satisfaction of the debt. (o) Here Note, that a Statute and Recognizance standing in equal degree, it is at the Executors Election to give precedency to which he will; neither is it material which of them was first or last; nor between one Statute and another doth the time or antiquity give any advantage as touching the Goods, though touching the Lands of the Conusor it doth; but as for his Goods in the hands of the Executor, who first seizeth them by his Execution, shall have the preferment; and before suing of Execution the Executor may give precedency to whom he will,

will, and may if he please satisfie the Recognizance before the Statute, at least if he do it before Execution sued thereupon: But Executors (under pretence or colour of Recognizances for the peace or good behaviour, or the like, or under pretence of Statutes for performing Covenants touching the enjoying of Lands, not forfeited, nor any summs of money possibly ever thereupon becoming payable) are not to with-hold payment of debts by Specialty, and thereby defraud the Creditors; so that if the Statute or Recognizance be only for performance of Covenants, and no Covenant be broken, an Obligation for the payment of present money shall be discharged before it: Also, no Judgement or Statute that is discharged, or is left and suffered to lye by agreement to bar others of their debts, shall bar debts upon Obligations. And here Note, That a Statute is a more expedite remedy than a Recognizance; for upon a Statute Execution may be taken out without any *Scire Facias*, or other Sute, which cannot be in the Case of a Recognizance, for there if a year be pass'd after the acknowledgement, no Execution can be sued out against the party, himself acknowledging it, without a *Scire Facias* first sued out against him; and if he be dead, then though the year be not pass'd, yet must a *Scire Facias* be sued.

6. After Statutes and Recognizances debts due by Obligations and penal and single Bills are to be paid if there be yet Assets. (p) And if there be divers Obligations, then it seemeth to be in the power of the Executor to discharge which he will first, (q) unless the day of payment in the one Obligation be expired, and in the other not yet come, in which Case the Obligation whereof the day of payment is expired is to be first satisfied; (r) or unless a sute be Commenced for one of the Obligations, for then it is not in the Executors power in prejudice of that sute to discharge an Obligation, for which no Action is brought. (s) But if Two several Creditors bring several Actions against the Executor upon Two Obligations, he that first getteth Judgement must first be satisfied. (t) Yet a debt due upon Record may be paid depending the Action; (u) and although in case of several Obligations, when the time of payment upon the one was come at the time of the Testators death, not so upon the other, and he to whom the Obligation is, whose time of payment was expired at the Testators death, forbear to demand or sue for his debt, untill the other Obligation become also payable; In this Case it is then in the Executors power to pay which he please, if the Goods extend not to pay both; for it is the Commencement of the Sute only which intitles to priority of payment, or at least restrains the Executors election; therefore an Executor may not pay a debt of equal degree to a Creditor that brings no Action for the same after another

(p) Broo. Abrid. tit. Exec. n. 172. 28 H. 3. Dyer 32. Dr. & Stud. cap. 10.

(q) Broo. ibid. & Dr. & Stud. lib. 2. cap. 10. p. 78.

(r) Broo. ibid. Labridg. dez Cases. Edit. An. 1599. fol. 174. p. 2. nu. 4. (s) Broo. ibid. 172.

(t) Labridg. dez Cases, fol. 174. p. 2. nu. 6. (u) Broo. ibid. nu. 172.

(w) Dr. & Stud.
lib. 2. cap. 10.

(x) Offic. Exec.
p. 222, 223. &
Dr. & Stud. p. 78.

(y) 41 E. 3. Fitz.
Exec. 68. 6, & 7
El. Dyer 232. vid.
21 H. 7. Kelw. 74.

(z) 5 H. 7. 27. So
Walmesley Just.
p. 39 Eliz. Co.
lib. Intr. 269.
Such a Recovery
by confession is
pleaded against
another, and held
good; Dr. & Stud.
p. 78. b.

(*) 7 H. 4. 10.
Plow. Com. 277.

(†) 2 H. 4. 21.

(a) Dr. & Stud.
lib. 2. c. 10.

(b) Dr. & Stud.
ibid.

(c) Dr. & Stibid.

(f) Fulb. Paral.
lib. 2. fol. 30.

Creditor hath brought his Action. (w) But whether a bare verbal demand without a sute be sufficient to hinder the Executors payment to the other, is a question, but resolved in the negative. (x) Yet an Executor may make payment of any debt due by Record, as by Judgement, Statute, &c. after sute begun by another for some other debt. And notwithstanding what hath been said, an Executor cannot in all Cases pay him first who first commenced sute, but he who first hath Judgement must first be satisfied; as when one Creditor doth first begin sute, and others suing after him get Judgement before him. (y) And in such Cases the Executor may expedite the sute of the one by a quick confession of his Action, and retard the sute of the other by Essoignes, Emplances, or dilatory pleas. (z) Nay, after sute commenced, yet until the Executor hath notice thereof, he may pay any other Creditor, and then plead that he hath fully administrated before notice of the others sute.

7. For it is a good Plea for the Executor to say, That he had fully Administrated before he had notice of the Plaintiffs Writ; (*) for though he do pay debts upon Contracts, the Writ depending against him upon a Bond, whereas he had no notice of the sute, he shall not be in such case charged. (†) Yet regularly in this case of an Action brought upon a simple Contract, the Executor is to plead and to set forth those debts upon Specialties, yet debts upon a simple Contract are to be paid before debts of Charity. (a) Likewise debts upon a simple Contract are to be paid before amends for a Trespas done by the Testator. (b) And here Note, that between a debt by Obligation, and a debt for Damages upon a Covenant broken, there is not any priority or precedency, but the Executor may pay which he please first. But if one hath a debt due to him from the deceased upon a simple Contract, or the like, and he sue the Executor for it, when there be debts due to others upon Bonds and Bills unsatisfied; in this Case the Executor may not pay this debt, nor may he suffer the Plaintiff to Recover in his Action, unless he hath Assets sufficient to satisfie the Bonds and Bills over and above that of the simple Contract.

8. After Obligations, Debts due upon simple Bills, or Merchants Books, or other Specialties are to be satisfied and discharged, (c) though indeed Bills are of the nature of an Obligation, and charge the Executor as well as an Obligation; for whatever words prove a man to be a debtor, or to have another mans money in his hands, or wherein the Testator, if he were alive, could not wage his Law, shall charge the Executor. (d) And under this Head may be placed debts due upon Shop-Books, and some verbal Contracts and Covenants Parol.

9. Now debts due for Rent upon Leases of Land or Grants of
RENT.

Rent will come into Consideration; though some are of Opinion that debts due for Rent in the Testators life-time (be the Rent reserved upon Leases made by or without Deed, for years, or at Will) are in equality of degree with debts due upon Specialties; if the Rent grew due since the Testators death, then it is not in Law accounted the Testators debt, for only so much is in Law accounted Assets to the Executor as the Profits of the Lease amounted to over and above the Rent; so as for that Rent so behind the Executor himself stands debtor, and therefore is sueable in the *Debet* and *Detinet*, whereas for the Rent behind in the Testators life-time, and all other the debts of his Testator, he must be sued in the *Detinet* only. For this reason it is, that an Executor sued for debt upon Bond or Bill, cannot (except in some special cases) plead a payment or recovery of Rent grown due since the Testators death, though of Rent behind at the time of his death it be otherwise.

10. If the Creditor hath no Specialty or Writing, the Executor is not bound precisely to pay the pretended debt, saving for the Servants wages; (e) for wherever the Testator might wage his Law, no Action lyeth against his Executor. (f) But debts due for Servants wages, and Workmen also must be paid. For Assumptions or Promises made by the Testator upon good consideration will oblige his Executors to a performance, or recompence in case of non-performance; but these are post-posita and give place to all the former; and an Action of the Case may be brought against the Executor upon the Promise or Assumption made by the Testator in his life-time by word only, without writing, if there be Assets. (g) And these Debts by Contract or Assumption express are to be satisfied before Legacies; (h) and also before the Reasonable Part to the Wife and Children, to which by custome in some Counties they are intitled. (i)

(e) Broo. Exec. nu. 87. & nu. 163.
(f) Terms of Law, verb. Exec.

11. If there be Two Creditors in equal degree, and both sue, if the Executor doth by *Covin* or agreement help that Creditor that began his Sute last, to his Judgement or Execution first, and there be not Assets then left to pay the other Creditor, he must be satisfied out of the Executors own Estate, if this *Covin* be proved against him; for an Executor ought not to help one Creditor to a Judgement sooner than the other *Covenously*. But the confession of an Action so done on purpose by an Executor, is no *Covin* in the Law; for *Covin* is where the Action is untrue, and not where the Executors bear a lawful favour. (k) But where there is really *Covin* in an Executor, there it shall be no prejudice to a Creditor; and for this reason it is also, that an Acquittance given to an Executor for more than he paid, shall not prejudice a Creditor for more than the Executor did really pay.

(g) Broo. Exec. nu. 172.
(h) Co. lib. 9. fol. 38. & Dr. & Stud. lib. 2. cap. 10. 11.
(i) 21 Ed. 4. 23. & 2 E. 4. 13. & 2 H. 6. 16.

(k) Dr. & Stud. ibid.

(l) Flet. lib. 2.
cap. 50. Bract. l.
2. fo. 60. Britton.
fol. 178. Co. Sup.
Litr. l. 2. cap. 3.
Sect. 287.
(m) Dr. & Stud.
lib. 2. c. 55.

(n) Cap. Statu-
tum. De Consec-
tudin. Provinc.

(o) Stat. 21 H. 8.
cap. 6.

12. A Mortuary or Corse-present is a Gift left by a man at his death to his Parish Church, for the recompence of his personal Tithes and Offerings, not duly paid in his life-time; and this by the Executor was used to be paid, next to the Heriot, and before the Debts. (l) And if a man be sued in the Spiritual Court for a Mortuary, a Prohibition will lye. (m) Though it appeareth by the Stat. of 13 Ed. 1. commonly called *Circumspexie agatis*; That Mortuaries are sueable in the Court Christian; and in the Stat. of 21 H. 8. cap. 6. an Order and Rate in money is prescribed for Mortuaries. And in Ancient Times if a man died possessed of Three or more Cattel of any kind, the best being kept for the Lord of the Fee, as a Heriot; the second was wont to be given to the Parson in right of the Church. (n) But more particularly touching Mortuaries, these Five things are more especially observable from the said Statute: (1.) That no Mortuary shall be taken or demanded of any for any person dying within this Realm, whose moveable Goods at the time of his death extend not to the value of Ten Marks; (2.) That no Mortuary shall be given or demanded but only in such places where by Custome they have been used to be paid. (3.) That no person shall pay Mortuaries in more places than one, viz. in the place of his most usual Dwelling or Habitation, and there but one only Mortuary. (4.) That for a person deceased, having at the time of his death in moveable Goods to the value of Ten Marks or more, (clearly above his debts paid) and under the value of Thirty pounds; there shall not be taken above Three shillings and four pence for a Mortuary; and under the value of Forty pounds, not above Six shillings and eight pence for a Mortuary; and of the value of Forty pounds or upward to any summe whatever (clearly above his debts paid) not above Ten shillings for a Mortuary. (5.) That for a Woman under Covert Baron, or Child, or any person deceased, that at the time of his death was not a House-keeper, nothing at all shall be paid by way of Mortuary. (o) And here Note, That Mortuaries ought to be satisfied out of the deads part only, that is, after and not before the Goods be divided among the Wife and Children, where by the custome of the Countrey she can challenge her Widows part, and they their filial portions; yet they are to be paid before any Legacies whatever; for that a Mortuary is of the nature of a Legacy, yea it is in the Law termed the Principal Legacy. Concerning other persons exempted from Mortuaries, and of the extensions and limitations, and other interpretations thereof, see the said Statute of 21 H. 8: at large.

13. If an Administrator compound for Forty pound with one who hath a Judgement of One hundred pound; this under-band com-

composition shall not prejudice any other Creditor who is a stranger to it : For every Administrator ought to execute his Office lawfully, in paying Debts, Duties, and Legacies in such precedence as the Law requires ; and an agreement made between them and others shall not be to the prejudice of a third person. (p)

(p) 8 Jac. Coor.
8. part 132. Turner's Case.

In Action of Debt brought against an Administrator, it was the Opinion of the Court, That he might retain monies in his own hands of the Intestates, to satisfy a debt due to himself ; But an Executor of his own wrong should not retain to satisfy his own debt. (q)

(q) Mich. 22 Jac.
in C. B. Bond and
Greens Case.
Godb. 216. vld.
Coor. 5. part.
Coulter's Case.

An Administratrix *durante minori etate* of an Executrix made divers Obligations unto the Creditors of the Testator, and afterwards took Husband : The Opinion of the Court in this Case was, That so much of the Goods of the Testators as amounted unto the value of the debts paid, and undertaken for, the Husband might retain as his own. (r)

(r) Mich. 19 Jac.
in C. B. Briers
and Goddard's
Case, Hob. 259.

Debt against an Executor by an Original, who pleaded a Recovery against him in the Court of *Ipswich*, and that he had not any more Goods than what would satisfy the said Recovery, and the Recovery was after the Test of the Original Writ ; but he averr'd, That before the Recovery he had not any notice of the Sute by the Original ; and the Plaintiff demurr'd ; and it was adjudged for the Defendant ; be it whether he had any notice or not ; for if one sue him, and give notice, yet he may confess the Action of another who commenced his sute after the former, and therein may pleasure his Friend, so as it be without fraud. But if he be sued by one upon an Obligation, and will pay another debt by Obligation without sute, there and in that case if he hath notice of the sute, it is a *Devastavit* ; otherwise if he hath no notice thereof, and so in such case the notice is material.

CHAP.

C H A P. XXIX.

Of Executors Accounts.

1. Executors obliged to Account. The Ordinaries power therein.
2. Within what time an Executor ought to Account.
3. An Account judicially made shall not prejudice absent Creditors or Legataries not duly summoned.

1. **T**O render an Account is not the least part of an Executors or Administrators duty, thereto obliged as well by his own Oath as by the Law; insomuch that should the Testator himself discharge his Executor from making an Account, yet may the Ordinary at his discretion in case of Fraud exact an Account from him. (a) Therefore the Ordinary may if he please call him to Account either Generally or Particularly, as the Case shall require; and that either at or without the motion or instance of the Creditors or Legataries, within a year, or what time he please; at which Account he may call all the Creditors and Legataries; and therein he must set forth what he hath received, what expended, and Prove it too if need so require: And upon a just Account so made, the Ordinary may acquit him, whereby he is discharged of all Sutes in the Spiritual Court. But as to that, the stile of each Court is to be observed. (b) And in the Proof of such Accounts the lesser summs, as under Forty shillings may be Proved by the Executors own Oath, the greater must be by due proofs.

2. The Executor ought to have a competent time for the performance of the Will before he be called to an Account, which time ought to be a Twelvemonth: (c) Yet he may sooner be called to it by the Ordinary in case of Male-Administration, or if the Ordinary see cause for it; (d) at least to a particular Account; but herein also the several stiles of several Courts are to be observed. And in this Account the Funerals, Debts, Legacies, and moderate Expences ought to be allowed to the Executor so far as he hath really paid, or is obliged to. And the Executor having made a full and just Account, ought to be acquitted and discharged of all further sute, if it be such an Account of his whole Office; (e) neither is he to be called by the Ordinary to any further Account. (f)

3. No Executor is obliged to make any Account to the Creditors or Legataries extrajudicially; (g) but at their instance to the Ordinary he is compellable to it judicially: and at the making of such Account they and all others having or pretending to have interest

(a) Lynwood in c. Religiosa. verb. rationem de test. lib. 2. Province. Const. Cant. & Jo. de Athon in mag. Glof. in Legatin. Libert. de Exec. Testa. & Jo. de Canib. & Olden. Locis Citatis.

(b) Swinb. part. 6. §. 20. nu. 4.

(c) l. nulli C. de Episc. & Cleric. & Boic. in c. tua nobis; de Testa. Extra. Covar. in c. 2. cod. tit. (d) Lynw. ubi supr. verb. Congr. & verb. rationem reddere.

(e) Menach. de Cal. 209. in fin. Broo. Abridg. tit. Admin. n. 14.

(f) l. semel C. de Apoch. & Olden. de Exec. ult. vol. tit. 8. nu. 17.

(g) Jo. a Canib. de Exec. ult. vol. 2. part. §. novissimum.

interest are to be summoned Legally to be present; (b) Otherwise the Account made in their absence, and they not summoned, will not prejudice them. (c) And yet extrajudicially an Executor may exact an Account of his Co-Executor, but not in Judgement or judicially; (k) but the Ordinary as aforesaid, may call them both or either of them to a Judicial Account. (l)

(b) Spec. de Inst. edit. 9. nunc vero nu. 45. & Lynw. in c. Statutum. 9. & postquam verb. Ordinarios.
(c) l. de unoquoq. ff. de re jud.
(k) Lynw. ibid. verb. rationem in fin. Glof. ibid.
(l) L. 2. C. de Adm. tut.

C H A P. XXX.

Of Administrators in a notion distinct from Executors.

1. Administrator, what he is in the Law.
2. The Origination of an Administrator by and to whom Letters of Administration are to be granted.
3. What provision of Law in Case of an Administrator after an Executors death.
4. What the Law is, in case a Stranger doth Administer, or the Ordinary grant his Letters ad Colligendum.
5. In what manner Administration is to be granted.
6. Of Administration durante minoritate.
7. In what Cases Letters of Administration may be granted.
8. Law-Cases touching this Subject.

1. **A**N Administrator is in the Law called *Executor Dative*, because as such he is constituted or appointed by the Ordinary. As by the Statutes, so by the Common Law of this Realm an Administrator is properly taken for him that Legally hath, or in his own wrong illegally, the Goods and Chattels of a person dying Intestate, or hath Administered to the same; but more properly, that hath them committed to his trust and charge by the Ordinary, and is accountable for the same whensoever it shall please the Ordinary to call him thereunto; and this is done for default of an Executor.

2. By the Constitution of *Leo* the Emperour it was Enacted, That if a man dying, bequeath any thing for the Redemption of Captives, &c. and appoint one to execute the Will in that point, the party so appointed should see it performed; but if he appointed none to do it, then was the Bishop of the City Authorized to demand the Legacy, and therewith to perform the Will of the deceased without delay. (a) From whence it is probably conjectured that the Administration of the Goods of persons dying intestate, by Bishops and others of Ecclesiastical Authority and Jurisdiction under them, was Originally derived. For it was Anciently Or-

(a) 1. nulli Lice-
re. 28. Cod. Episc.
& Cleric.

dained,

(b) Westm. 2.
an. 43 Ed. 1. c. 19.

(c) 13 Ed. 3. c. 11.

(d) 38 Ed. 3. fol.
26. & 41 E. 3.
fol. 2. & 37 H. 6.
f. 15. Dyer f. 236.
Co. lib. 5. f. 9. &
lib. 6. f. 18. & lib.
9. f. 38. & Co.
Inst. lib. 2. cap. 11.
Secd. 200. f. 133.
b. & Regist. f. 141.
V. N. B. f. 61. Fitz.
N. B. f. 120. D. &
Rast. pla. f. 320.
(e) 21 H. 8. 5.
(f) Broo. Admini-
strat. 47. & Co. lib.
2. fol. 40. & lib. 9.
fol. 39.

*It was resolved by
all the Justices,
against the Sta-
tute of 5 E. 6.
That the Father
and the Mother
are the next to
whom Admini-
stration shall be
granted, of the
Goods of the Son
or Daughter, who
dye Intestate...*

24 El. Co. 3. part.
in Raicliiff's Case.

(g) Broo. Exec.
217. 26 H. 8. 7.
Coke 1. 69. Dyer
272. Terms of
Law. tit. Admini-
strat. (b) Fitz. Admini-
strat. 9.

dained, (b) That the Goods of those dying Intestate should be committed to the disposition of the Ordinary, who should be obliged to answer the deceaseds debts, so far forth as his Goods would extend unto, even as Executors themselves in the like case. And after this by another Statute, (c) power was given to the Ordinary to appoint Administrators, and to Authorize them as fully as Executors, to gather up and dispose the Goods of the Intestate : Alway provided, that they should be accountable for the same as Executors ; by which Statute it is ordained, That the Ordinaries shall depute the next and most lawful Friends of the Intestate to be his Administrators ; who then in Law have nigh in all things equivalent power with Executors. (d) Inasmuch that whatever hath been or may be spoken of the one, may nigh in all points be properly applyed and aptly accommodated to the other. And lastly, in confirmation of the Premises it is enacted by a latter Statute, (e) That in case any person die Intestate, or having made a Will, the Executor therein named refuse to Prove the same, the Ordinary, or others Authorized for the Probate of Testaments may grant Administration to the deceaseds Widow, or to the next of his Kin, or to both at the Ordinaries discretion, taking Surety for them for the due Administration. (f) And by the same Statute it is further Enacted, That if divers persons claim the Administration as next of Kin, which be in equal degree of kindred to the deceased, and where any one person only desireth the Administration as next of Kin, where indeed divers persons be in equality of kindred, then in every such case the Ordinary is at his Election and Liberty, to accept any one or more making request, where divers do require the Administration.

3. An Executor after Probate made dying Intestate, the Administration of the first Testators Goods not Administred may be granted to whom the Ordinary shall see cause in Law ; and he may grant the Administration of the Goods both of the first and second deceased *de bonis non Administratis* to one and the same person ; in which case the Administrator ought to see, that his Administration have special words for granting the Administration of the first Testators Goods not Administred. (g) For though some are of Opinion, that by the general Administration the Administrator shall have not only the Executors but the Testators Goods also, yet this is otherwise held for Law at this day. (h) And an Action shall lie for or against such an Administrator as for or against an Executor, and he shall be charged to the value of the Goods of the deceased, and no further, if it happen not otherwise by his own false Plea, or for that he hath wasted the deceaseds Goods : But if the Administrator die, his Executors do not succeed him in that Administration, but the Ordinary is to commit a new Administration.

The

The Law is the same when an Executor dyeth before he hath Proved the Will, or Administred any of the Goods; in which Case a new Administration is to be granted to the Widow or next of Kin of the first Testator with the Will annexed, unless he had also bequeathed the residue of his Goods unto the said Executor; for in that case the Administration of his Goods belongs unto the Widow or next of Kin of the Executor, and not of the Testator. Or if an Executor be made Universal Legatary, and die before he hath Proved the Will of the Testator, in this case likewise the Administration of the Testators Goods doth belong to the next of Kin of such universal Legatary, and not of the Testator. (i)

(i) Dyer 371.

4. If a Stranger that is neither Administrator nor Executor, take to himself the deceaseds Goods, and Administer of his own wrong, he shall be charged and sued as an Executor and not as an Administrator in any Action that is brought against him by any Creditor: But if the Ordinary make a Letter *Ad Colligendum bona Defuncti*, he that hath such a Letter is no Administrator, but the Action lieth against the Ordinary himself as well as if he took the Goods into his own hands, or by the hands of any of his Servants by any other Command or Order. (k) And Note, that if an Administrator doth alienate or convert to his own use all the Goods which did belong to the Intestate, in this case an Action doth lye against the Executor of that Administrator, and is lyeable to be charged for the debts due by the Intestate, which is otherwise of an Executors Executor.

(k) Terms of Law, verb. Administrator.

5. An Administration must pass under Seal in Writing, not by word of mouth; for the Ordinary cannot commit Administration by word of mouth; otherwise it is if it be entered into his Registry, though Letters of Administration be not formerly drawn.

(l) Yet it may be granted as well upon condition as absolutely, and as well for part as for the whole Estate; so that a man dying possessed of Goods in Two Provinces, making his Will of the Goods only in one of them, and dying Intestate as to the Goods in the other Province, Administration may be granted as to the Goods of that Province whereof he died Intestate; likewise Administration may be granted only for or during some certain limited time. (m) Also an Executorship limited to a certain time, the Ordinary ought to grant Administration after the expiration thereof; or if a man appoint an Executorship not to begin till some certain time after the Testators death, Administration is to be granted till that time doth Commence. (n) In like manner where an Executor is made conditionally, and the condition yet depending, it is for prevention of prejudice to Creditors and Legataries, Provided, that the Ordinary may commit Administration to the said conditional Executor only during the dependency of

(l) 11 H. 6. 24.

(m) Dyer 294.
Fitzh. Administr.
5. 24 H. 6. 14.
& Plowd. 279.

(n) Brownl. Rep.
1 part. 5. 2 part.
119.

(c) l. si quis in-
stituat, §. 1 & 2.
ff. de her. Instit.
(p) l. 1. §. si sub
Condit. de bon.
poss.

the condition; (c) but upon infringement or defect of the condition Administration is to be granted to the next of Kin. (p)

6. There is also an Administrator *durante minori etate*, which is a special kind of Administration, and is only in case where an Infant under the Age of Seventeen years is made Executor; in which case the Administration is committed to one or more of the next of Kin of the Infant during his Minority, that is, till he be capable of the Executorship, which is at the Age of Seventeen years; the power of such an Administrator is equivalent to the power of other Administrators; (q) and therefore if it be granted during the Minority of several joyn-Executors, all under the Age of Seventeen years, and one of them dye, or attain to the Age of Seventeen years, then is the Administration determined; so also is it if a Feme-Minor Executrix take a Husband of that Age. (r) And if such an Administrator *durante minori etate* get a Judgement, and before Execution the Infant-Executor doth come of Age, the Executor himself may have Execution of this Judgement.

7. To the several reasons and causes for granting of Letters of Administration mentioned in the Premises may be added, That if a Testament be not made with all Freedome, as it ought to be, viz. without fear of Loss or hope of Gain, without Threats, Flattery, Fraud, or Collusion; without Error, Uncertainty, Fallacy, Imperfection, Cancelling, or Revocation; or if the Testator be a person incapable of making a Testament; or if his Will, contrary to the nature of Wills, depend upon another mans Will; or otherwise the party dying Intestate, as aforesaid, or Testate and the Executor refuse to Prove the Will; In all these cases the Administration is to be committed to the Widow or next of Kin to the Intestate, (s) sometimes with the Will annexed if there be any, and in some cases not: But the Administration is not to be committed according to the Statutes to the Widow or next of Kin, in case of suspending the Probate by reason of the yet dependency of some unaccomplished condition in the Will, but to him that is made Executor, and that only for and during so long time as the condition dependeth; for in this case the party is not Intestate so long as the condition is accomplishable or performable. Again, if the Mind, Will, and Intention of an intestate touching the disposition of his Goods and Chattels be declared, though for want of making an Executor he dye Intestate, (t) so as Administration is to be committed; yet for that here is not only an inchoation but in part a progression of a Will, it is to be annexed to the Letters of Administration, and to be observed and performed by the Administrator.

In *Detinue* brought by an Administrator of a *Chain*, of which the

(q) Coke 5. 29. 6.
27. 9. 27.

(r) Brownl. Rep.
part 1. 31. 46, 47.
80. 101. &
part 2. 83. 148.

(s) 23 H. 8. 5.
31 Ed. 2. cap. 11.

(t) Jul. Cla. 6.
Testa. 9. 5. nu. 2.

the Intestate died possessed, and which after came to the Defendants hands; the case was upon a special Verdict, That the Administration was committed to the Defendant in London by the Bishop of Cork being in London; but they did not find that the Defendant was possessed of the Chain in London; and in this Case these Points were resolved: 1. That a Bishop of Ireland being in England might commit Administration of things in Ireland, because it is but a Power and Authority which follows his person, wheresoever it is. 2. That an Administrator made by a Bishop of Ireland, could not bring an Action here as Administrator, because of the Letters of Administration granted in Ireland there could be no Tryal here. 3. That an Administrator might declare of his own possession, although he was never possessed, if the Intestate at the time of his death was possessed, for that the Law casts a possession upon him. 4. That upon a general Issue pleaded, the Jury might find a foreign matter, as a thing done out of England. 5. It was resolved, That in the Principal Case, the substance of it was the Possession, and not the Administration. It was adjudged for the Plaintiff. *Pasch. 27 Eliz. in C. B. Carter and Crofts case. Godbolt 33. Vid. Dyer 304.*

An Administrator brought an Action of Debt for Rent, which was found for the Plaintiff, and Judgement given. Exception was taken that the Plaintiff had not shewed by whom the Letters of Administration were granted to him: But the Opinion of the Court was, That it was too late to shew that after Verdict; for that the Jury have found, that the Administration was duly granted. And it was said in the Court, That in a Declaration it is not necessary to shew by whom the Letters of Administration are granted; or to say that they were granted by him *cui pertinet*, or *per loci illius Ordinarium*. (u) Yet Note, that it was said in another case, That if an Administrator bring an Action against an Administrator, it is not necessary for the Plaintiff to shew by whom the Letters were granted to the Defendant, but he must shew by whom the Letters of Administration were granted to himself to entitle him to the Action; for if it appear not to the Court, that he is Administrator, he cannot Sue. (w)

If an Infant be made Executor, Administration, during the Minority of the Infant, may be committed to the Mother; and the same shall cease and be void, when the Infant is of the Age of Fourteen years: But such Administrator cannot sell the Goods of the Testator, unless it be for necessity of payment of debts, because he hath the Office of Administrator, only *pro bono & commodo* of the Infant, and not to its prejudice. (x)

Note, it was resolved *per Curiam*, That an Administration *durante minori etate* of an Executrix, was not within the Statute of

(u) Trin. 1593. in B. R. Marshall and Ledshams Case. Styles 282. vid. 1 Jac. in Excheq. Chamb. Wade and Arkinsons Case adjudged contrary. Cro. 2 part. 10. Hugh. Abridg. tit. Administrator.

(w) Mich. 1655. in B. R. Ingram and Fanshaws case. Styles 483.

(x) Coe. 5. part. Trincas Case, 59.

21 H. 8. of necessity to be granted to the Widow of the Testator, because there is an Executor all the while; otherwise, if the Executor were made from a time to come. (y)

(y) Mich. 15 Ja.
C. B. *briers and
Goddards Case*.
Hob. 250.

An Infant was made Executor, and Administration was granted to another *durante minori etate* of the Infant, who brought Action of Debt for money due to the deceased, and had the Defendant in Execution, and then the Executor came of full Age. It was moved that the Defendant might be discharged out of Execution, because the Authority of the Administrator was determined, and he cannot acknowledge satisfaction: And it was said, That he was rather a Bailiff to the Infant, than an Administrator: But the Judgement of the Court was, That though the Authority of the Administrator was determined, yet the Recovery and Judgement did remain. (z)

(z) Mich. 29 El.
in C. B. *Goldb.*
104.

Mich. 7 Car. B. R.
*Wells and Somer
Case*. Cro. 1 part.
174.

Wid. Mich. 9 Car.
*Durckester and
Wells Case*. Cro.
Rep. par. 1.

In an Account brought by an Administrator *durante minori etate* against the Defendant as Bailiff of such a Mannor; it was found for the Plaintiff: It was moved in stay of Judgement, That it is not shewed, that the Executor the Infant was within the Age of Seventeen years, and it might be he was above the Age of Seventeen years, and yet under Age: But the Opinion of the Court was, That it shall not be so intended unless it be shewed; that he was above Seventeen years; and especially when the Defendant had admitted him to bring the Action, and had pleaded to Issue.

Mich. 41, 42 Eliz.
*Frince and Simp-
sons Case*. Anderf.
Rep. Cal. 58.

Between P. and S. the Case was; An Infant was made Executor, to whom certain Leases among other things were devised, and Administration during his Minority committed to one, who sold and alienated the Leases. It was agreed by the Justices, That the Administrator could not sell the Leases, unless there were good and reasonable cause moving thereunto; as in case there were no other Goods save the Leases wherewith to pay the Testators debts, which ought of necessity to be paid; the Leases may to that end and purpose be sold, otherwise not; but Beasts and other things which cannot long be kept or preserved, especially fat Beasts, Corn, or the like may be sold. And of this Opinion was the Chief Justice of the Kings Bench, and the Chief Baron.

Hill. 38 Eliz. C. B.
Byron vers. Byron.
Cro. Rep. par. 3.

Debt as Administrator of B. upon an Obligation, the Case was, That the Intestate died in *Lancashire*, but the Obligation was at *London* at the time of his death; and the Bishop of *Chester*, in whose Diocess he died, committed Administration to J. S. who released to the Defendant; and the Arch-Bishop of *Canterbury* committed the Administration to the Plaintiff; and this Release was pleaded in Bar, and it was thereupon demurr'd. *Warberton*, Every Debt follows the person of the Debtee, and *Chester* is within the Province of *York*, where the Arch-Bishop of *Canterbury* hath

hath nothing to do. *Anderson*, Where one dies who hath Goods in divers Diocesses in both Provinces, there *Canterbury* shall have the Prerogative; otherwise there would be Two Administrations committed, which is *Res inaudita*. The Debt is where the Bond is, being upon a Specialty; but debt upon a Contract follows the person of the debtor, and this difference hath been oftentimes agreed, *vid. Dyer* 305. And if the Arch-Bishop of *Canterbury* hath not any Prerogative in *York*, but that several Administrations ought to be committed; yet at leastwise Administration for this Bond ought to be committed to the Arch-Bishop of *Canterbury*; wherefore the Release is not any Bar.

Debt against the Defendant, as Administrator of *F.* he pleads a Recovery against him as Executor, and besides to satisfy that he hath not any Assets. And it was thereupon demurred and adjudged to be a good Plea, and he shall not be twice charged: wherefore it was adjudged for the Defendant.

Hill 40 Eliz. C.B.
Smalpeace ver.
Smalpeace, Cro.
Rep. par. 3.

Debt against the Defendant as Administratrix of *T. H.* her Husband, upon a Lease to the said *T.* by Indenture for years, and how the Defendant is Administratrix to him: And for Rent arrear after his death the Action was brought in the *Debet* and *Detinet*; upon Not Guilty pleaded it was found for the Plaintiff: and now moved in Arrest of Judgement, That the Declaration was not good; for that &c. And at another day it was moved, That this Declaration ought to have been in the *Detinet*, and not in the *Debet* and *Detinet*, because she hath the Term as Administratrix, and is not charged by her own Contract, but by an Act of the Testator, and to that purpose was cited 19 *H. 8. 8.* 10 *H. 5. 7.* And a Precedent was shewn in *C. B.* between *Barker* and *Kelsay*, where the Action was brought in the *Detinet* only. And *Godfrey* affirmed, that in *Fenns* Case in this Court it was Ruled, That the Action ought to be brought in the *Detinet*. *Gandy*, The Action is well brought in the *Debet*: For this Rent, though Arrear after the death of the Intestate, begun first in the Administratrix, and therefore the Action well lies against her in the *Debet*: For the reason why the Action against an Executor shall be in the *Detinet*, is for that the debt grew due by the Testator; and therefore it cannot be said that Executor *Debet*. But in an Action against the Heir it shall be in the *Debet* and *Detinet*, because he is bound by special words in the Obligation; and here the debt which in the time of the Administratrix occur'd, is her debt; and in *Dyer* 6 Ed. 6. 81. the Action is brought in the *Debet* and *Detinet* for Rent Arrear in the time of the Executor, and admitted to be good. *Popham* accord. For the being charged with the Rent in her time, it accreus by reason of the Profits of the Land, which she herself received, and therefore she is charged, having *quid pro quo*.

Pasth 41 Eliz. B.
R. Body ver.
Hargrave, Cro.
Rep. par. 3.

For.

For if an Executor hath a Lease for years of Land of the value of Twenty pound *per Ann.* rendring Ten pound *per Ann.* Rent, it is Assets in his hands only for Ten pound over and above the Rent. *Fenner* agreed to this Opinion, and to that purpose cited 10 H. 6. 11. That the Husband shall be charged after the death of the Feme for Rent Arrear in his own time, because he received the Profits of the Land; So as the Rent grew due in respect of the occupation and taking of the Profits. And therefore she is chargeable, and not merely as Executrix. *Clinch* agreed with them; wherefore it was then adjudged for the Plaintiff. Note, That afterwards this Judgement was reversed in the Exchequer Chamber for the point in Law: For all the Judges of the Common Bench, and Barons of the Exchequer held, That she ought to be charged in the *Detinet*, because she is charged only by the Contract of the Intestate. 5 Co. 31.

Mich. 10 Jac. B.
R. Stephenson
vers. Wood, Bolst.
par. 2. 3, & 4.

The Case was; One died Intestate in the County of *York*, and a Stranger prayed Letters of Administration to be granted to him, which was Repealed by the Delegates at *York*; there was an Appeal to the Court of Delegates in the Chancery, who did Repeal the former Sentence at *York*; and adjudged, that the Party made no Will; and granted Letters of Administration to him who Appealed to them: The Arch-Bishop of *Canterbury* granted Administration to a second person; and the Arch-Bishop of *York* to a Third person, who made a Release unto the Debtor of the Intestate; upon which Release, debt was brought by the first Administrator against the Defendant, who pleaded the Release made to him: And whether this grant of Letters of Administration by the Judges Delegates were good, or not, was the Question. But the better Opinion of the Court was, That the Letters of Administration, which were granted by the Judges Delegates, was not good; but there being *Bona Notabilia*, the Administration was to be granted by the Arch-Bishop: And it was said, That if the Party who died Intestate, had Goods in several Provinces, both the Arch-Bishops there having a Peculiar, might grant Letters of Administration; and although the King be Supreme Ordinary, and by Delegates may do many Acts; yet the Court of Delegates cannot do this, nor have they power to Prove any Wills; for the power of the Judges Delegates, is, *Potestas Delegata corrigere non exequi*: And the Court said, That it was adjudged in one *Brakenburies* Case, That the Judges Delegates had not power to grant any Letters of Administration.

Trin. 24 Eliz. B.
R. Dorrel against
Collins, Cro. Rep.
par. 3.

An Exception was taken to a Declaration, because the Plaintiff conveyed his Interest to an Administrator, to whom the Arch-Bishop of *Canterbury* did grant the Administration of all the Goods of the Lessee, and did not shew how the Arch-Bishop granted it, either

either as Ordinary, or by his Prerogative: And this was held by all the Court a material Exception: But it was afterwards alledged, That all the Presidents in this Court (*viz.* B. R.) and in C. B. were so in general, without special shewing *how*; and for that they would not change the Presidents, they disallowed the Exception. And in this Case it was held, That if an Administrator doth grant *Omnia bona & catalla sua*, a Term which he hath as Administrator doth not pass, for it is not *suum*, but he hath it in right of the Intestate: But if one hath a Lease as Executor or Administrator of the Manor of D. and he granteth all his right and interest in the Manor, the Term which he hath as Executor &c. doth pass; for he had no other Right in it, and his intent is to pass it, but by general words it shall not pass.

Debt against the Defendant as Administratrix, she pleaded *Plene Administravit*; the Jury found, That the Intestate was indebted to divers by Obligations, and that after his death the Defendant had taken in the Obligations, and had obliged her self to pay the greater part of the summs contained in the Obligations, at certain dayes to come, and for the residue had promised to the parties, That in consideration of delivery in of the said Obligations, that she would pay &c. And by the Opinion of *Anderfon, Windham*, and *Periam*, it was held clearly a good Administration, so that the property of the Goods of the Intestate to that value were altered and changed in the Defendant.

Action *Sar. Trover*: And Declares as Administrator of *J. S.* and that Administration was committed to him by *A. B.* Official to the Bishop of *Peterborough*, and sheweth not that he was Ordinary of the Place, or that the granting of Administration did belong to him; and this matter after Verdict was alledged in Arrest of Judgement; but because divers Presidents had been so, and that such Declarations had been allowed, the Court did give Judgement for the Plaintiff.

Debt as Administrator to one *Philips*, and Declares, That Administration of the Goods of *Philips* was committed to him *per Adrian Vane Sacra Theologie Doctorem*, such a day *apud Monmouth*, and the Plaintiff recovered in the Common Bench by default; and Writ of Error was thereon brought, and the Error Assign'd, because it is not shewn that *Vane* was Ordinary of *Monmouth*, nor that the committing of Administration appertained to him; and in regard it was in a Declaration which ought to be certain, and he is not a Bishop, nor any person who may be intended to be the Ordinary, the Judgement was therefore reversed.

It was moved by *Coke* the Queens Attorney, That the committing of Administration being by the Arch-Bishop, although he had not Goods in divers Diocesses, because it is in his Province wherein

Mich. 28, 29 Eliz.
Saamp. ver^s.
Hutchins. Cro.
par. 3.

Mich. 29, 30 Eliz.
La. y ver^s. Smith.
Cro. par. 3.

Mich. 26, 27 Eliz.
Morgan ver^s.
Williams. Cro.
par. 3.

Hill. 37 Eliz.
Cam. Scac. Bish.
gham ver^s.
Smeethrich. Cro.
par. 3.

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wherein he hath Jurisdiction, it is not void, but only voidable by Sentence; and it is not like to an Administration committed by another Bishop of the Goods of a man who died in another Diocese, or who had Goods in divers Diocesses; and this difference hath been taken and agreed in the Queens Bench, &c. But the Justices said, it was all one, and the Administration is void in both cases, and not voidable only.

Mich. 43 Eliz. C.
B. Godfrey verſ.
Woodward, Cro.
Rep. par. 3.

Debt upon an Obligation of One hundred pound, one of the Defendants was Out-lawed, the other pleaded, that he who was Out-lawed, was made Executor, and solely Proved the Will, and Administred, and that the Defendant as Servant unto him took divers of the Testators Goods by his Delivery, and by his appointment had sold them, *Abſq; hoc* that he Administred as Executor, or in any other manner, and it was thereupon demurr'd, and adjudged to be an ill Plea, because he doth not say that he refused before the Ordinary, nor confesseth any Administration; for that which he confesseth is not any Administration, and so no answer to the Plaintiff: Wherefore it was adjudged for the Plaintiff.

Hill. 2 Jac. B.R.
Barnesſt and
Sir Charles Tel-
vertons Caſe.
Yelv. Rep.

Debt; The Plaintiff as Administrator of J. S. sued upon an Obligation made by the Defendant, and had Judgement, afterwards the Administration is revoked; but notwithstanding that, the Plaintiff proceeded, and got the Defendant in Execution. And upon a motion to the Court, it was agreed by the whole Court, That the Execution was void, and that the Defendant ought to be discharged, *Quia Erronice emanavit*; for that the Letters of Administration being revoked, the Plaintiffs power is determined; therefore the ground of his sute being overthrown, viz. his Commission, he hath no Authority to proceed further, and the Execution issued without Warrant. The same Law (*per Curiam*) on a Judgement for an Administrator, the second Administrator shall not have Execution thereon, for he is not privy to the Record. *Quod nota.*

Mich. 42, 43 Eliz.
C. B. Temple
verſ. Temple.
Cro. Rep. par. 3.

Debt; The Case was: Rent was granted to Baron and Feme for their lives, the Rent was Arrear, the Baron dies, another Rent is Arrear, the Feme dies Intestate, and her Administrator brings debt for the Arrearages due in the Life of the Baron, and after. All the Court resolved that it well lay, because the Arrearages survived to the Feme, as well as the Rent it self. But an Exception was taken to the Declaration; for that it is alledged, that Administration was committed by the Dean of Lichfield, and it shews not by what Authority he committed it, nor that he was *Loci illius Ordinarius*; and for this cause the Court held the Declaration to be ill, for the Court intends not his Authority, being special, without shewing it. But the pleading of Administration committed by a Bishop is good

good enough, without saying that he was *Locus illius Ordinarius*, for so it shall be intended, and so the Presidents warrant it; but in a Bar of Replication it is vicious: *vid. 35 H. 6. 46.*

Debt brought against C. as Administrator, and Judgement thereupon; and now moved in Arrest thereof, That this Action was brought by an Administrator, who shews, That Administration was committed to him by the Arch-Deacon, but shews not what Authority the Arch-Deacon had to commit Administration; and in proof thereof 21 H. 6. 23. and 35 H. 6. 46. were cited. And the difference is where Administration is committed by the Bishop or Metropolitan, and where by one who hath a peculiar Jurisdiction; for in the last case he ought to shew how he hath his power, *Plowd. 297.* And although it be after Verdict, yet it is not holpen by the Statute of 18 Eliz. cap. 14. being matter of substance and not of form, as it was adjudged in *Cutts* and *Bennet's* Case; but the Court held, that it was well enough; and they said, That the Books are of Peculiars, for it cannot be intended, that they have any Authority unless it be shewn. But the Arch-Deacon is *Oculus Episcopi*; And *de Jure Ordinarius* he is to commit Administration: And it was adjudged for the Plaintiff.

An Executor recovers Debt, and dies Intestate; the Ordinary commits Administration *de bonis non ecc.* The Administrator shall not have a *Scire Facias* on the Judgement, but a new Action of Debt as Administrator to the first Testator, who is now dead Intestate.

A man lets a Lease for years, the Lessee covenants for him and his Assigns, that he will not Lop nor Top the Trees during the Term: And after the Lessee dies Intestate, and the Ordinary committed Administration to J. B. who lopp'd the Trees; whereupon the Opinion of the Court was, That it was a breach of the Covenant, for that an Administrator is an Assign as well as an Executor.

Administrator brought Debt, and declared that Administration was committed to him by A. B. *Sacra Theologiae Professorem*, and saith not *Locus illius Ordinarius*; for which cause upon Error the Judgement was reversed.

In this Case the Question was, whether the Ordinary had power to take a Bond or Obligation of the Administrator to distribute, according to the Ordinaries discretion, the Goods that should remain after Debts and Legacies paid. And it seemed to the Court, That such Obligation is not good: But in regard the Case was of great consequence, *Adjournatur.*

Debt brought by J. S. against A. P. Executor of H. W. upon a Bond or Obligation of One hundred Marks, the Defendant pleaded, he was never Executor, nor Administered as Executor; whereupon

Mich. 17 Jac. B.
R. c. Chiverton
vers. Trulgeon.
Cro. Rep. par. 24.
Pl. 10.

Hill. 28 H. 8. Le-
ver vers. Low-
mor. Moo. Rep.
nu. 13.

Mich. 5 Eliz.
Moo. Rep. n. 36.

Mich. 26 & 27
Eliz. Morgan
vers. Williams.
Moo. Rep. n. 304.

Hill. 23 Jac.
Slawny vers. Es-
bridge. Moo. Rep.
nu. 1891.

Mich. 26 Ph.
& Ma. Stiles
vers. Porter. 368.
Rep. nu. 53.

whereupon they were at Issue, and at a *Nisi Prim* it was found by a special Verdict, That he had received Seven pound Debt due to the Testator, and made an Acquittance for the same, and took into his possession several particular parcels of Goods of the Testators, and converted them to his own use: whereupon all the Justices resolved, That it was an Administration; but at the Request of Sir *Anthony Brown* they respited the Judgement; after the Defendant died, and it repented the Justices that they had not given Judgement.

34 H. 6. 14. Roll.
Abridg. tit. Executor. lit. D.

The Ordinary may grant several Administrations of several parts of the Intestates Goods, 10 Ed. 4. 1. b. 18 H. 6. 22. b. 38 Ed. 3. 21. Also he may grant the Administration conditionally, as whereas it was before granted to *J. C.* who is now Out-lawed, or a Prisoner, or beyond Sea, &c. he may grant it to another with an *Ita tamen*, That if the said *J. S.* return into England, he shall Administer when he returns.

20 Ed. 4. 17. Roll.
Abridg. tit. eod. lit. B.
Roll. ibid. 11 H. 4. 24.

If an Executor takes only the Goods which the Testator in his life-time took from him *per totum*, it is not an Administration.

If certain Goods be devised to a Co-Executor, and he take them without the Assent of the other Co-Executor, it is an Administration, because a Devisee cannot take the Goods devised without the Executors Assent.

Roll. ibid. tit. Executor. lit. E.

Administration may be committed of the Goods of a Woman Covert who dies Intestate, for possibly she might have things in Action, which by the Law are not given to her Husband, nor after her decease are at all invested in him. D. 8 Eliz. 25. 90. Admitt.

Hill. 26 H. 8.
Beaulieu 25.
and Hugh's Abridg. vol. 3.
tit. Administ.

A man possessed of Goods, made an Infant his Executor, and died; the Ordinary committed Administration *durante minori etate* of the Infant, to a Stranger: The Question was, when the Infant came of full Age, what Remedy he should have against the Administrator for the Goods? It was the Opinion of the Justices, That he should not have an Account against him, but he might have *Detinue* against him for the Goods, or otherwise Sue him in the Ecclesiastical Court for them.

Trin. 30 Eliz. B.
R. Scabbs and
Highways Case.
Cro. 2. par. 92 &
Hugh's ibid.

Debt against an Executor: The Defendant pleaded, That he had taken Letters of Administration: The Plaintiff replied, That he Administred of his own wrong, and after took Letters of Administration. It was the Opinion of the Justices, That by his own Act he cannot purge himself of the first wrong; and therefore this Action by the name of Executor, good.

Passh. 30 Eliz. B.
R. Henson and
Webb's Case. Cro.
2. part. 121.
Mich 41. 44. Eliz.
B. R. Scidmore
vers. Wyntone.
Cro. Rep. par. 34.

Note, it was resolved *per Curiam*, That Debt upon a Contract of the Intestate doth not lye against an Administrator.

Debt by an Administrator. After Verdict it was moved in Arrest of Judgement, That the Declaration was not good, because

he

he Counts, that Administration was committed to him by the Bishop of St. Davids, and he saith not *Legi illius ordinarius*, nor *enī Administratio pertinuit*; *sed non allocatur*. For it is intended that he is the Ordinary, and so is the common course of Declarations, unless the Administration is alledged to be committed by one who hath a peculiar Jurisdiction.

The Commissary of the Bishop of London committed the Administration of Goods by word, and gave an Oath to the Administrator, which was Entered in the Acts of the Commissary; but there were no Letters of Administration, either in the name of the Commissary or Ordinary; and whether this was a good Administration granted by word, was the Question? It was not resolved, but the better Opinion seemed to be, that it was not. It cannot be without deed.

Vid. 21 H. 6. 29.
21 Ed. 4. 50.
Vid. Co. 8 part.
§1. Acc.

If divers persons be made Executors, and some of them refuse at one time, and some of them at another, before the Ordinary, they may afterwards Administer the Goods of the Testator, but if they all refuse before the Ordinary, and the Ordinary commits the Administration of the Goods to another: Afterwards they cannot Prove the Will.

Cook 9 part. 39.
Hensloe's Case.

A Merchant of Ireland by an Obligation made in Ireland, became bound to A. B. of London; which Bond was in London, and there remained. A. B. died Intestate in Com. B. in England. The Bishop of Ireland committed Administration to the Son of A. B. who released the debt. The Arch-Bishop of Canterbury committed the Administration to the Wife of A. B. and she brought an Action of Debt against the Obligor; and adjudged the Action was maintainable; for that the Administration shall be committed by the Ordinary of the place where the Obligation is, and not where the Debt first did arise; because it is not Local.

11 Eliz. Dyce.
207. Laker's
Case.

C H A P. XXXI.

Of Administrations fraudulent and revocable.

1. The Statute of 34 Eliz. cap. 1. Touching fraudulent Administration.

2. In what Case an Executor ought to Prove the Will notwithstanding Letters of Administration granted to another.

3. Letters of Administration once granted, are not revocable at the Ordinaries meer will and pleasure.

4. In what Case Acts done by a former Administrator are good in Law, notwithstanding second Letters of Administration afterwards granted.

5. Cases in Law touching this Subject.

Stat. 43 Eliz.

Stat. 43 Eliz.

FOrasmuch as it is often put in ure to the defrauding of Creditors, that such persons as are to have the Administration of the Goods of others dying Intestate committed to them if they require it, will not accept the same, but suffer or procure the Administration to be granted to some Stranger of mean Estate; and not of Kin to the Intestate, from whom themselves or others by their means do take Deeds of Gifts, and Authorities by Letters of Attorney, whereby they obtain the Estate of the Intestate into their hands, and yet stand not subject to pay the Debts owing by the said Intestate; and so the Creditors for lack of knowledge of the place of habitation of the Administrator, cannot Arrest him or Sue him: And if they fortune to find him out, yet for lack of ability in him to satisfie of his own Goods, the value of that he hath conveyed away of the Intestates Goods, or released of his Debts by way of Wasting, the Creditors cannot have or recover their just and due debts. Be it Enacted, That every person and persons that shall hereafter obtain, receive, and have any Goods or Debts of any person Intestate, or a Release, or other discharge of any Debt or Duty that belonged to the Intestate upon any fraud as aforesaid, or without such valuable consideration as shall amount to the value of the same Goods, or Debts, or near thereabouts (except it be in or towards satisfaction of some just and principal Debt of the value of the same Goods or Debts to him owing by the Intestate at the time of his decease) shall be charged and chargeable as Executor of his own wrong, and so far only as all such Goods and Debts coming to his hands, or whereof he is released or discharged by such Administrator, will satisfie, deducting never-
theless

" theless to and for himself allowance of all just, due, and principal Debts upon good consideration without fraud, owing to him by the Intestate at the time of his decease, and all other payments made by him, which Lawful Executors or Administrators may and ought to have and pay by the Laws and Statutes of this Realm.

2. Although upon an Executors refusal to Prove the Will and take on him the Office of Executorship, and thereupon Administration be committed, the Executor cannot (as some hold, *Jed Quere*) go back again to Prove the Will, and assume the Executorship; (a) yet if only upon the Executors making default to come in upon Process to Prove the Will, the Administration be committed; in that Case the Executor may yet at any time after Appear and Prove the Will, and so cause the Administration to be revoked. (b) Also, if after an Executors refusal it shall appear to the Ordinary that he had Administred before such his refusal, then may the Ordinary revoke such Administration granted to another upon such refusal, and compel the refusing Executor to Prove the Will; for that by so Administring precedent to his refusal he hath accepted and determined his Election, and therefore cannot be admitted to accept and refuse also; so that in this Case also the Administration may be revoked.

3. Some have been of Opinion, That the Ordinary after he hath granted Letters of Administration, may yet afterwards even without cause shewed, and at his meer pleasure revoke the same, and grant it to another; yea, that if the Ordinary grant Letters of Administration to one, and then again afterwards grant Administration of the same Goods to another, that hereby the first Letters of Administration be vacated and revoked, albeit there be no exprets words of revocation contained in the latter. (c) But indeed the Law seems far otherwise, and that the Ordinary, after he hath granted, according to the Statutes in that behalf provided, the said Administration, cannot afterwards at his pleasure revoke it, and grant the same to another without cause, that is, unless the first Administration were illegally granted, or where the first Administrator either cannot or will not Administer, or the like.

4. Where there is a former Administration regularly granted, all Acts Lawfully Executed by the first Administrator as Administrator, are good in Law, and shall bind the next and succeeding Administrators. For this reason it is, that if Administration be granted to a Stranger, and the next of Kin sue to have it revoked, and the first Administrator (*pendente lite*) during the sute sell the Goods on purpose to defeat the second Administrator, and then the first Administration happens to be revoked, and the Administration to be committed to another; In this Case the second Administrator

(a) Offic. Exec. pag. 60.

(b) Mich. 27, 28 Eliz. inter Sale and Banker.

(c) 4 H. 7. 14. Littl. Broo. Scilicet. 330. 34 H. 6. 14. Dyer 339. Broo. Administ. 7.

It hath been adjudged per Curiam, that where the Ordinary hath granted Letters of Administration to one who ought to have them, that in such Case they ought not to be revoked by the Ordinary. Pasch. 23 Char. in B. N. E. interwar. Et Casus. Styles 10.

— administrator cannot recover these Goods, or have any remedy, unless the first Sute for granting the Administration were by Appeal annulled; in which case all that the first Administrator did was void, and the second Administrator in such Case may recover all the Goods the first Administrator sold. Again, if the first Administration be conditionally granted, all the Acts which the Administrator doth before the breach of the Condition, are good; so that the subsequent Administrator cannot avoid any gifts or sales before such breach made by the said former conditional Administrator.

(d) 21 H. 8. 5.
Coke 6. 18. *New*
B. of Entries. 38.
Plowd. 281. Coke.
6. 19. Dyer 339.

(d) But suppose the Bishop of a Diocese doth, as he ought, grant Letters of Administration of the Goods of an Intestate, not having *Bona Notabilia*, to one: And the Arch-Bishop grant Letters of Administration of the same goods to another; In this Case the effect of the first Administration is suspended until the other be repealed by Sentence. And if there be a Will concealed, and thereupon Administration is granted, after which it happens that the Will is produced and Proved; In this Case the Administration is determined, and all Acts vacated which had been formerly done by such a surreptitious Administrator, (e)

(e) Brownl. Rep.
2 part. 83. Coke
8. 135. Plowd.
281. 9 H. 5. 5.

5. In Trover and Conversion, the Case was; A man died intestate, and the Ordinary committed Administration to a Stranger; and afterwards the next of Kin of the Intestate Sued a Citation in the Ecclesiastical Court to have it repealed; and *pendente Lite* the Administrator sold the Goods of the deceased to defeat the Plaintiff; and afterwards the Letters of Administration were revoked by Sentence, and the first Sentence annulled and made void, and new Administration granted to the Plaintiff. In this Case it was resolved, that the Action did not lye; and here the difference was holden between a Sute by Citation, for to countermand or revoke the former Administration, and an Appeal, which is alwayes a reserving of a former Sentence; for an Appeal doth suspend the former Sentence, otherwise of a Citation: And in this Case, because the first Administrator had the absolute property of the Goods in him, he might sell them to whom he would; and although the Administration be afterwards revoked, the same shall not make void the Sale. (f)

(f) 37 Eliz. 2. in B.
R. Co. 6 part.
28. *Packman's*
Case.

Letters of Administration were granted to J. S. and he released all Actions; and afterwards the Administration was revoked, and declared to be null and void by Sentence. It was adjudged, that in that Case the release was void. (g)

(g) Mich. 9 Jac.
Rot. 2304. in C.
B. *Thompson*
and *Hobby's Case*.
Brown. 1 part. 51.

An Administration may be granted upon Condition; and such an Administration, if the Condition be not performed, may be revoked; But if such an Administrator, before the Condition be broken, giveth away the Goods; yet such a Gift is good. (h)

(h) Co. 6 part.
39. in *Packman's*
Case.
Mich. 35, 36 Eliz.
Anderj. Rep.
213. Case.

It was agreed by the Court in *Caren's Case*, That if the Bishop
com-

commit Administration, he may revoke the same without any Sentence of Revocation to be given in any Ecclesiastical Court, or elsewhere.

It was adjudged, That if a Metropolitan grant Administration where the Intestate hath not *Bona Notabilia* in divers Diocesses, it is voidable, not void. But 19 *Eliz.* it was clearly held, That if a Bishop of a Diocess grant Administration which appertains to the Metropolitan, it is void.

Will, 22 *Eliz. B.*
Rimer *Pere*
and *Jefferys*.
Moo. Rep. na.
289.

Two Executors were in Sute which of them was the True Executor, the Ordinary (depending the Sute) granted Administration, it seemed to the Court that he could not so do.

Trin. 43 *Eliz. C.*
B. *Robins Case*.
Moo. 874.

CHAP. XXXII.

Of Filial Portions.

1. *The Pretorian Law in point of Succession.*
2. *Whether the Ordinary may compet the Administrator to give Filial Portions.*
3. *What provision of Law now in force as to distributions of Intestates Estates.*

1. **A**N Administration of a deceaseds Goods and Chattels doth not proceed by or out of the Civil Law properly so called, which only makes Heirs, and giveth right of Succession, but out of the Pretorian Law; or Law of Conscience; which in Equity call-eth sundry to the Succession of other mens Goods by Administration where there is no Will, and in some Cases where there is a Will, as where the Will is concealed, or the Executor renounceth the Will; but if the Will once appear, then the Administration ceaseth. In Cases where Administrations are to be granted, the Children of the deceased had liberty by this Law to take it within a year after the death of the deceased; and if they were further off of Kin, then they had only a hundred dayes to take it in, unless those who were to take it were Infants, Mad, Deaf, Dumb, or Blind; in which Cases there was a longer time assigned. By this Law the Pretor granted Administration, not only according to the Tables of the Testament, but many times even against the Tables of the Testament: As where a Child was not dis-inherited in his Fathers Will, by and in plain and exprefs terms, but passed over with silence only; or that the Child was not born at the time of his death, and so not certainly known whether any such Child were living or not, or whether to be hoped for: In which case if it did after appear, then was the Mother by that Law to be put in-

to possession of that which was the Childs part. If there appear no Will, then was the Administration by this Law committed in this order or method. First, the Children of the deceased were admitted; Secondly, those that were next of Kin by the Male Line; Thirdly, those that were next of Kin in the Female Line; which difference notwithstanding between Male and Female at this day is taken away, and they that are next of Kin, are equally admitted of either Sex. Lastly, came those which had right thereto, in that they were Man or Wife. (a)

(a) Ridley's view
of the Civil and
Ecclesiastical
Law, Sect. 8.
cap. 1. par. 1.

2. It hath been and still is much controverted, whether the Ordinary hath power to compel the Administrator to give Portions to Children, or to allot and distribute Filial Portions to the deceaseds Children out of his Estate; If the Ordinary attempt this, either before or after the granting of Letters of Administration, it is held by some, that the Administrator may have a Prohibition against the Ordinary, (b) and divers have been granted accordingly; yet notwithstanding this, it is usual for the Ordinary to order and allot distributions of Filial Portions, and therein Prohibitions not often granted at this day. (c)

(b) Coke 8. 135.
2. 29. Dyer 255.
Westm. 2. cap.
20. & 31 Ed. 3.
cap. 11.
(c) Hill. 13 Jac.
Coke B. Hen-
flowes Case. &
Trin. 3 Jac. Coke
B. in Davies case.
& Hill. 2 Char. 1.
Coke 9. in For-
therly's Case.

(d) 22, 23 Char.
2.

3. But now this Question is fully Resolved, and the Controversy at an end, for by a late Statute, (d) it is Enacted, "That the Ordinaries shall call Administrators to Account, for and touching the Goods of any person dying Intestate, and order and make just and equal distribution of what remaineth clear (after all Debts, Funerals, and just Expences first allowed and deducted) amongst the Wife and Children, or Childrens Children, if any such be, or otherwise to the next of Kindred to the dead person in equal degree, or legally representing their Stocks *pro suo cuiusque jure*, according to the Lawes in such Cases, and in manner and form following: That is to say, one third part of the said Surplusage to the Wife of the Intestate; and all the residue by equal Portions to and amongst the Children of such persons dying Intestate, and such persons as legally represent such Children, in case any of the said Children be then dead, other than such Child or Children (not being Heir at Law) who shall have any Estate by the settlement of the Intestate, or shall be advanced by the Intestate in his life-time, by Portion or Portions equal to the share which shall by such distribution be allotted to the other Children to whom such distribution is to be made, &c. And the Heir at Law, notwithstanding any Land that he shall have by descent or otherwise from the Intestate, is to have an equal part in the distribution with the rest of the Children, &c. And in case there be no Children, nor any Legal Representatives of them, then one Moiety of the said Estate to be allotted to the Wife of the Intestate, the residue of the said

See the said Stat.
at large.

"Estate

"Estate to be distributed equally to every of the next of Kindred of the Intestate who are in equal degree, and those who legally represent them. Provided, that there be no Representations admitted among Collaterals after Brothers and Sisters Children : And in case there be no Wife, then all the said Estate to be distributed equally to and amongst the Children, &c. And no such distribution to be made till after one year after the Intestates death ; nor without sufficient security to be given by those to whom such distribution shall be made, for refunding back to the Administrator (according to each ones ratable proportion) in case of the Intestates Debts afterwards sued for and recovered, or otherwise duly made to appear : For other Proviso's, Rules and Limitations in the said late Act of Parliament, the Reader is referred to the Statute it self, there more at large.

Note : An Administration cannot be revoked for the not bringing in of the Inventory, and the Account of the Administrator : And the Ordinary upon an Administration granted, had not [before the said Statute] power to make any distribution of the Surplusage, nor to take any Bond for to Answer the Surplusage, by the true meaning of the Statute of 21 H. 8. which intends a benefit to the Administrator, and not an unprofitable burden. (e) The Ordinary hath not power to make distribution of the Goods, because there may be a Debt which was unknown ; and if he might distribute, then the Administrator should be charged with the debt of his own Goods. *Vid. Briersley's Case, Brown 1 Part. 31. acc.* Whether this were Law then, is a needless question, it being otherwise now by the Statute aforesaid.

(e) Mich. 15 Jac. in C. B. *Tooker and Leanes Case*, Hob. 190. *Vid. Styles Pasch. 24. B. R. Hill. & Bards Case, acc. Vid. Hill. 16 Car. in C. B. Merth. 93. Hugh. Abridg. verb. Adm. p. 117.*

C H A P. XXXIII.

Of Right to Administration.

1. What the Method of Succession is by the Laws of this Realm.
2. How the Civil Law understands it.
3. The difference between the words [Kindred and Consanguinity:] between [Cognatos and Agnatos.]
4. Whether an Alien no Denizon may be an Administrator.
5. Administration granted a Caveat depending, is void in Law.

1. **B**Y the Law, both by the Statute Lawes, the Common Law, and by the Civil Law, the nearest of Kin to the deceased Intestate is to succeed in the Administration of his Goods. (a) As first to the Husband or Wife ; but if they fail, then secondly, to the

(a) 31 Ed. 3. c. 11. & 21 H. 8. c. 5. Littl. Broo. Sect. 231. 415. Fitzh. Exom. 13. Coke 9. 39. 40. & 3. 40. Dyer 339. & 4 H. 7. 14.

the Children whether Male or Female; but if they fail, then thirdly, to the Parents, whether Father or Mother; but if they fail, then fourthly, to the Brothers or Sisters of the whole blood; but if they fail, then fifthly, to the Brothers or Sisters of the half blood; but if they fail, then sixthly, to the next of Kin, as Uncles, Aunts, &c. From these the Ordinary cannot grant the Administration to a Stranger, if they seasonably require it, and are not otherwise affected by some legal impediment; but he may grant it to which of these he please, if divers of them in equal degree do desire it; yea, to a Stranger if they neglect it.

2. The Civil Law as to the Intestate Estate, whether Real or Personal, considers it all under the same Notion; yea, in this case it makes no distinction either of Ages or Sexes; but all that are concern'd may challenge an equal proportion, provided they be of equal degree, and of identity in blood, whether of the whole or of the half blood. But the Wife was otherwise provided for by the Civil Law, (b) Therefore exempted from a Succession to the Goods of her Intestate Husband. There are but Three Orders or Degrees chiefly of Kindred which the Civil Law doth specially take notice of: The first is in the Right Line Descendent, as Children, Grand-Children, and so downwards. The Second is in the Right Line Ascendent, as Parents, Grand-Parents, and so upwards. The Third is in the Line Transversal or Collateral, as Uncles, Aunts, Great-Uncles, and so side-wards; alwayes remembering that the whole blood is more worthy than the half blood; and the higher Degree more worthy than that which is more remote.

3. *Consanguineus* or *Consanguinity*, and *Agnatus* properly so called, and strictly so taken, doth comprehend only them that be of Kin by the Fathers Side. (c) Therefore the word *Kin* or *Kindred* is of a greater Latitude than *Consanguinity*, because it comprizeth *Cognatos* as well as *Agnatos*, and so comprehends all the Relations of both Lines, both Male and Female; for *Cognati* properly understood, signifie only such as are the Mother-Side, and of the Female Line. And here Note, that the most remote *Agnati* or Kindred of the Line Male in a Right Line Descendent are preferred before the highest Kindred of the Female Line; but it is otherwise in a Transversal or Collateral Line. (d) But as to Land in Fee or of Inheritance the Right thereof *quasi ponderosum* ever descends Downwards in a Right or Transversal Line, and never doth Re-ascend the same way that it Descended by the Ancestors death; yet it may Ascend a *Latere* or Sideward for want of Right Heirs in the Descendent Line, (e) which often happens.

4. Suppose an Alien born and not made Denizen happen to dye Intestate within this Realm, having Kindred born beyond Sea, and others though more Remote born in this Realm; In this Case

(b) 1. 4. Sol.
Matr.

(c) Franc. in c.
Scienc. de Elect.
6. 2. Alex. Conf.
229. nu. 16. vol. 6.

(d) Cowell Inst.
jur. Angl. lib. 3.
tit. 5.

(e) Glanville lib.
2. cap. 1. & Co-
well ubi sup. lib.
3. cap. 1. §. 9.

Cafe an Alien may be Administrator, and have Administration of Leases, as well as of Personal Things, because he hath them as an Executor in anothers Right, and not to his own Use : And he may be an Administrator as well as a person Out-Lawed or Attainted may be an Executor ; and no Prohibition will lye in this Cafe. (f)

(f) Croo. Rep. Palch. 1 Char. 1. in Sir Upwel Carsons Case.

5. An Administratrix Sued the Defendant in the Court of Chancery ; the Defendant shewed, That before Administration was committed to the Plaintiff he had put in a Caveat in the Ecclesiastical Court, hanging which Caveat, the Plaintiff obtained Letters of Administration, of which he demanded Judgement pendant the Appeal. It is a good Cause to stay the Sute until the Appeal shall be determined. In this Case it was also said, That the same was not like unto a Writ of Errour, for by the purchasing of a Writ of Errour, the Judgement is not impeached until the Record be Reversed : But the very bringing of an Appeal is a suspension of the first Judgement for the principal matter. (g)

(g) Mich. 43 El. Willoughby and Willoughby's Caf. Goldsb. 119.

If an Executor dye Intestate, Administration ought to be granted of the first Testator, for now he is dead Intestate : 21 Ed. 4. 24. 26 H. 8. 7. But if an Executor after Administration dye Intestate, and the Ordinary grant Administration of all the Goods of the Executor, he may Administer the Goods of the first Testator, 10 Ed. 4. 1. *Quere*, if an Administrator doth make an Executor, and dies, his Executor shall not have the Administration of these Goods, but a new Administration ought to be granted of them. 34 H. 6. 14. D. 32 H. 8. 47. 11. Co. 5. Brud. 91. b. Adjudged. And if an Executor before Probate of his Testators Will doth make his Executor, and dye, the Executors Executor cannot take upon him the Execution of the first Testament ; but Administration of the first Testators Goods is to be granted *cum Testamento annexo*, D. 22, 23 Elix. 372. 8.

Roll. Abridgmen. tit. Executor.

C H A P. XXXIV.

Of Succession in the Right Line Descendent.

1. *What the Jus Representationis is; or that several Children by one Father deceased do Conjunctim represent the Person of that Father.*

2. *That Succession (when the Case so requires): is to be computed in Stirpes not in Capita.*

3. *That the Grand-Child (living the Father) succeeds not to the Grand-Father; nor (by the Civil Law) if conceived after his Grand-Father's death.*

4. *How the Succession (according to the Civil Law) is, in Case of Children not all of them by the self-same Parents; and how at Common Law.*

1. **N**EXT to the Widow, this Right of Succession in the Right Line descendent is the first degree of Right to the Administration of an Intestates Goods; for they are in the first place admissible to such Administration, who are of the Right Line. descendent from the deceased: So that if a man dye Intestate, leaving behind him Children, Parents, and Collateral Kindred, the Children do in the first place Succeed as to the Goods whereof he died Intestate, exclusively to the Grand-Children whose Parents are living. It is otherwise if their Parents be dead; for if a man dye, leaving one Son, and one or more Grand-Children by another Son deceased, these Grand-Children are Admissible, together with that living Son, their Uncle. And this is *Jus Representationis*, whereby several Children of one Father do *Conjunctim* represent the Person of that Father: But yet this must be understood according to the Law-Terms, not in *Capita* but in *Stirpes* only, that is, not according to the several Branches, or by Poll as we use to say, but according to the one *Common Root* of those several Branches; and therefore put all the Grand-children together, they can have no greater proportion among them all than singly belonged to their Father, were he then alive. So that in the foresaid case the Estate is to be divided into Two equal parts, whereof one Moity is due to the Son, the other Moity to the Grand-children to be equally divided amongst them. (a) And this Right or Law of Representation holds in *infinitum* in the Right Line descendent; (b) contrary to the Opinion of the Famous *Bartol*, who held, that it reached not beyond the Great Grand-children.

2. In like manner, if there be divers Grand-children by divers Sons deceased; and no Son living, they succeed to their Grand-Father.

(a) §. Cum fili-
us. Inst. de hered.
quæ ab intest. &
Graf. §. Succes-
sio ab intest. q. 2.
nu. 6. & Capriol.
de Succes. ab In-
test. lib. 1. nu.
601.

(b) Capr. ibid. &
Graf. ibid. q. 2.
nu. 13. Covar.
Pract. quest. cap.
38. nu. 5. & Go-
men. Resol. Tom.
1. cap. 2. nu. 15.

ther *in Stirpes* not *in Capita*, that is as aforesaid, not according to the distinct number of the several Grand-children, but according to the number of their Fathers or Sons to the Intestate; so that the Grand-children by each deceased Son to the Intestate shall *Conjunctim*, and amongst them all respectively have just that proportion, which their respective Fathers, or Sons to the Intestate could challenge if they had been alive at the time of the Intestates decease; so that Two Grand-children by one Son have no more than one Grand-child by another Son, because the Son by whom are the Two Grand-children to the Intestate could have no more than the Son by whom there is but one Grand-child, in case both the Sons had been living when the Intestate died. Indeed, if there be no Grand-children, save only by one Son, then they succeed equally according to their number, unless they be in unequal degree, as Grand-children and Great Grand-children. And the reason why Succession goes *in Stirpes* not *in Capita*, is because they succeed not in their own right, but in the right of their Ancestor.

3. A Grand-child whilst his Father is alive, hath not the precedent right to the Administration of the Goods of his Grand-Father dying Intestate; nor doth a Grand-child succeed to his Grand-Father unless he be born, at least conceived, at the time of his Grand-Fathers death. (c) So that a Grand-child conceived after his Grand-Fathers death is not in his own person by right of Representation (according to the Civil Law) Admissable to succeed his Grand-Father. (d) And that which hitherto hath been said of Sons and Grand-Sons holds true in Law as to Daughters and Grand-daughters, who are equally with the other Admissable to a succession of their Intestate Parents Goods without any distinction of Sex. (e)

4. Whereas the Law is, That Children shall succeed equally to the Administration of their Intestate Parents-Goods, this must be understood only of such Children as are begotten of the self-same Parents; for if there be Children by divers Parents, as if a Woman hath had Two Husbands, and one Child by the First, Two by the Second; In this case each of them respectively succeeds (according to the Civil Law) only to the Goods of his own Father, but all of them equally to their Mothers. (f) And this also by the same Law holds true as to the Grand-children by such Children of each marriage respectively. Otherwise it is, if a man hath had two Wives, with Goods and Children by each of them, and dye Intestate, leaving no Relict or Widow; for in this case all the Children by both Wives shall equally succeed to the Goods and Chattels of their Father dying Intestate.

In the case of a Prohibition granted to the Ecclesiastical Court, for granting Letters of Administration to a Sister of the half blood, when there was a Brother of the whole blood, who sued for them.

(c) Barry de Success. Intest. m. 5.

(d) Graf. ubi sup. q. 2. nu. 16. Guid. Pap. q. 612. Capriol. ubi sup. lib. 1. nu. 619. §. & licet. Inst. de hered. quæ ab Intest.

(e) Graf. ibid. q. 2. nu. 2.

(f) Graf. ibid. q. 17.

them. It was agreed by the Court, That it is in the power of the Ordinary to grant Administration either to the Brother of the whole blood, or to the Sister of the half blood, at his Election, because they are in equal degree of Kindred to the Intestate. But if Administration be granted to the Husband and Wife where the Husband is not of Kin to the Intestate, but a Stranger; in such case if he survive his Wife, he should have all the Goods, and the Kindred be defrauded, which is not reasonable; and therefore such Administration shall be void. (g)

(g) Mich. 23 Car.
in B. R. Styles
74, 75. Vid. Pasch.
24 Car. in B. R.
Hill and Birds
Case. Styles 102.
acc.

C H A P. XXXV.

Of Succession in the Right Line Ascendent.

1. *Whether Parents, specially the Mother, be next of Kin to her Child.*
2. *The method of Succession (by the Civil Law) in the Right Line Ascendent.*
3. *How the Succession goes by the Civil Law, when some of the Collaterals concur with those of the Ascendent Line.*
4. *Whether by the same Law, the deceaseds Brothers and Brothers Children may concur with their Parents to the Succession.*

1. **N**otwithstanding that Maxime at the Common Law, That *Inheritance cannot Lineally Ascend*, yet is the Parent more nigh of blood to the Child even by that Law, than is the Uncle. (a) And by the Civil Law, as the Son and Daughter be in the first degree of Kindred in the Line Descendent: So the Father and Mother are in the first degree of Kindred in the Line Ascendent. (b) To constitute a Kindred it is sufficient that the Relations do centre and agree in *aliquo Tertio*, or flow from one common Head or Fountain, or spring from the same Stock or Root; Thus the Father and the Daughter, the Mother and the Son, the Mother and the Daughter, the Father and the Son, they flow from one and the same Fountain, they spring from the same Root, viz. the Grandfather; and therefore are of Kin each to other. And by the Laws of this Realm Parents are reputed to be of Kin to their Children, and the Mother to be of Kin to her Child; and therefore by the Statute Law if a man seized of Lands in Socage, his Heir being within the Age of Fourteen years; In this case the Mother shall have the Wardship of her Son, as being next of Kin to whom the Lands cannot descend. (c) Indeed, by the Law of the twelfth Table, the Mother could not Succeed to her Children, nor they to her. (d) But this is now altered, the Law now being otherwise.

(a) Littl. Tenures, fol. 1.

(b) §. 1. Instit. de Gra. Cognat.

(c) Stat. de Marlebridge, an. 52 H. 3. & Brook Abridg. tit. Administrat. 47. Coke lib. 3. Ratcliff's Case.

(d) Instit. de S. C. Tertil. in Prin.

(e) It

(e) It cannot be denied but that this Question, viz. *Whether the Mother be of Kin to her Child?* hath been much controverted amongst the ablest Lawyers, and in the close of all, after much dispute it hath been adjudged in the Negative, viz. That the Mother is not of Kin to her Child. (f) As in that remarkable of the D. of *Suffolk* in *Ed.* the sixth's time, wherein an Administration was granted away from the Mother to a Sister of the half blood. According to which Judgement divers other Administrations for several years after were granted away from the Mothers, to the Brethren and Sisters as next of Kin. Notwithstanding all which, the Law indeed being all that while quite otherwise than was practised, at last the Truth prevailed, and the practice now frequent, and Judgement every where given for the Mother, that she is of Kin to her Child, (g) who dying Issueless and Intestate, the Administration of his Goods may be committed to her as next of Kin, according to the Statute. Or if he be Issueless but not Intestate, and maketh his Kin his Executor, or bequeath the residue of his Goods to his Kin, the Mother in this case is Admissible to the Executrixship as next of Kin to her Child, or on the same account to enjoy the Legacy during her life, and after her death then the other next of Kin. (h)

2. If the deceased leave no Children, they in the Right Line Ascendent do by the Civil Law succeed him, but in this Order. First, the Father and Mother succeed equally, and exclusively to all others that are of a more remote degree; or the Mother only, if the Father be not alive; or the Father only, if the Mother be dead. (i) And if there be several Parents of a distinct Line, who are equal in degree but unequal in number, they succeed according to their Stock or Root, not according to their number; thus the Grand-Father by the Fathers side shall have as much as both Grand-Father and Grand-Mother by the Mothers side. (k) But if the Parents be in an unequal or different degree, then the right of Representation doth cease, and the nigher shall ever exclude the more remote. Thus the Father excludes both the Grand-Fathers by the Fathers and Mothers side, and the Mother both the Grand-Mothers. (l)

3. There are also some of the Collateral Line, who by the Civil Law do concur with those of the Ascendent Line; for the Brothers and Sisters of the deceased do succeed him, together with the Father and Mother. (m) And the Succession when the Brothers concur, is proportioned according to their number. (n) But if there be divers Kindred of the same degree to the Intestate, whose Father is dead, whereof some are by the Fathers side, others by the Mothers side; as if the deceased leave a Grand-Father by his Fathers side, and a Grand-Father and Grand-Mother by the Mothers;

(e) Auth. Novel. de hered. ab intestat.

(f) Brook. Abr. tit. Administ. nu. 47. & Coke lib. 3. in *Ross's Case*. cum similib.

This remarkable Case of the D. of Suff. wherein the point was, whether the Mother or the half Sister ought to have the Administration, is at large in Swinb. part 7. §. 8. nu. 10. with the reasons of Judgement exactly weighed and considered.

(g) 21 H. 8. cap. 5.

(h) §. Si legittur. Novel. ibid. ubi sup. & D. D. in l. cum tra. §. fin. ff. de Legat. 2. Grati. Theor. Com. Opin. §. Fidei Commiss. q. 16.

(i) Grati. §. Success. ab Intest. q. 22.

(k) Grati. ibid. & Pet. Greg. lib. 45. cap. 9. nu. 10. & Cuiac. ad Novel. 118.

(l) Grati. ibid. Greg. cap. 9. nu. 21. Covar. de Success. ab Intest. & Cuiac. ubi supra.

(m) Grati. ibid. Greg. cap. 9. nu. 22. Capriol. lib. 2. nu. 76. de Success. ab Intest. & Auth. Novel. de hered. ab Intest.

(n) Novel. 218. Cuiac. in Covar. de Success. ab Intest. Vassq. de Success. progra. lib. 3. §. 25. nu. 38. Pet. Greg. lib. 45. c. 9. nu. 13. & Mynsing. Observ. Cent. 6. a. 41.

In this Case the Succession is not proportioned according to their number, but it is to be divided into two equal parts, and the Grand-Father by the Father's side draws the one Moity, the Rest the other Moity. And if it happens that together with those of the Line Ascendent, and with Brothers of the whole blood to the deceased, there be the Sons of other Brothers of the whole blood deceased; In this Case the Sons of such Brothers deceased shall Succeed together with the others, but not according to their Number, but according to their Stock or Root; that is, those Sons of such deceased Brothers shall among them all have only that proportion which would have come to their Fathers if they had been alive. (o) Here Note, that this is meant only of the Children of such Brothers deceased; therefore the Grand-children, and others more remote are not admitted together with the Parents and Brothers, and Sisters of the deceased. (p)

(o) Grati. q. 23.
Greg. 29. Cuiac.
in Novel. 118.

(p) Grati. & Co-
var. ubi supra.

(q) Grati. q. 24.
& Fach. lib. 6. c. 8.

(r) Pap. lib. 21.
tit. 1. art. 8. Guid.
Pap. Confil. 176.

(s) Meynard, lib.
7. cap. 21.

(t) Meynard ibi.
ita Judicat. in
Artesio Tholof.

(u) Decii Confil.
223.

4. Brothers and Sisters only of the half blood to the deceased do not concur with the Parents in the Succession. (q) Thus the Grand-Father in Succession to his Grand-child doth exclude the Brothers of half blood to such Grand-child, unless the Brothers be of the same blood, and of the same side with such Grand-Father. (r) And if a man dye Intestate, leaving a Mother and the Children of his Brothers deceased behind him, the Mother alone shall Succeed to the Intestate, (s) unless there be other Brothers of the deceased then living; for then the said Children of the said Brothers deceased shall concur with the Mother. (t) Thus Brothers and Brothers Children may concur with their Parents to the Succession of the deceased, but all other Collaterals are excluded by the Parents; inasmuch that the Uncles both by the Fathers and the Mothers side are excluded by the Grand-Father and Grand-Mother of the deceased. (u)

CHAP.

C H A P. XXXVI.

Of Succession in the Line Transversal or Collateral.

1. *The Line Collateral is Two-fold: In which Line the Jus Representationis holds only in Brothers Children, not in their Grand-Children.*

2. *Regularly the whole blood is ever first Admissable to Succession in the Line Transversal or Collateral.*

3. *Yet in that Line the nigher Degree, though but of the half-blood, is preferrable before a remoter Degree of the whole blood.*

4. *How far, and to what Degree Collateral Kindred may Succeed each other.*

5. *How the Succession goes, in case the deceased leaves no Children, but Kindred only by the Ascendent and Collateral Line.*

1. **T**HE Transversal or Collateral Line is Two-fold; the one Descendent by the Brother and his Children downwards; the other Ascendent by the Uncle, and so on upwards; and none of the Ascendent do ever Succeed, unless they of the Descendent Line do fail. (a) And the nighest degree to the deceased in the Descendent Line do Succeed first; but that failing, then the nighest of Kin in the Line Ascendent. And although Brothers Children of the whole blood do ever exclude Brothers Children of the half-blood, yet this *Jus Representationis* in the Collateral or Transversal Line holds only in Brothers Children, not in their Grand-children. (b) So that if A. dye, leaving behind him Children by one Brother deceased, and Grand-children by another Brother also deceased, these Grand-children of the one are excluded by the Children of the other. (c) For in a Transversal or Collateral Succession the Son alone doth represent the Father, and then only when the controversie is touching the Succession of his Uncle, (d) not of his Great Uncle or others of any degree higher or farther off. (e) But when the Children of Brothers deceased do concur with other Brothers of the deceased, then they all succeed according to the Stock or Root, and they draw no more than their Father should have done if he had been then alive. (f) And by the said Law of Representation it comes to pass, That Brothers Children who are in the third Degree, are by way of Fiction supposed to be in the second Degree, and so are preferr'd before the Uncles of the deceased, who are in the same third degree. (g)

2. In the Transversal or Collateral Line this is a perpetual Rule, That they are first to be admitted who are of the whole blood.

(a) Brañ. l. 2. c. 30. nu. 1. Britt. c. 119.

(b) Cusae. ad Nov. vel. 18. Capriol. lib. 3. nu. 125. Grañ. q. 31. Pet. Greg. lib. 45. cap. 11. nu. 8. & Covar. de Succes. ab Int. Peregrin. art. 21. nu. 7. 8. de Fidei Commiss.

(c) Alex. lib. 3. Conf. 5.

(d) Ibid. in fin. Confil.

(e) Menoch. lib. 4. Praef. 95. nu. 8.

(f) Grañ. q. 30.

(g) Novell. 118. cap. 2. & Cuiac. lib. 8. Pet. Greg. cap. 11. nu. 70.

blood of the deceased. As thus; *A.* having *B.* a Son, and *C.* a Daughter by one Wife, and *D.* a Son by another Wife, dies; *B.* Succeeds him and dies Issueless; In this Case *C.* the Daughter to *A.* and Sister to *B.* by the whole Blood succeeds him, and not *D.* the Brother by the half Blood. (*b*) In like manner *E.* having *F.* a Brother, and two Sons, *viz.* *G.* by one Wife, and *H.* by another Wife, dies; *G.* succeeds him and dies Issueless; In this Case *F.* Uncle to *G.* (who is of the whole Blood) succeeds him, and not *H.* Brother to *G.* by the half Blood. (*i*) But if *F.* also dye Issueless, then *H.* succeeds him, because he is Allied to him both ways, as well by the Grand-Father as by the Grand-Mother. (*k*) And therefore, unless *F.* be Brother to *E.* as well on the Mothers side as on the Fathers side, the succession will be otherwise.

3. Suppose a man dies, leaving behind him neither Children, Parents, Brothers, nor Sisters, nor their Children, but only Brothers Grand-children, Uncles, and other Collateral Kindred; In this Case we must follow the Rule of Law, the higher in degree shall have the precedency in right; and if there be divers in the same degree, they are all equally Admissible according to number, not Root or Stock, and that without distinction of Sex, consideration being had only of the Kindred it self. (*l*)^e Again, suppose there were Three Brothers, whereof two of the whole Blood, and one of the half Blood; If these two of the whole Blood dye, each of them leaving a Child behind him; whereof one afterwards dyes also, and issueless; In this Case the surviving Uncle is preferred before the other Son by the Brother, albeit that Brother was of the whole Blood to the Father of the deceased. (*m*) So also the Uncle of a deceased is preferable before his Brothers Grand-children, albeit the said Grand-children proceeded of a Father who was of the whole Blood to the deceased, and the surviving Uncle but of the half Blood. (*n*) For in the Collateral Line the being of the whole or half Blood is not considerable beyond Brothers Children; for then the nearness of degree, not whether whole or half Blood is considerable: So that although a Brothers Son of the whole Blood shall exclude a Brother of the half Blood, yet even the Children of Brothers and Sisters of the half Blood shall exclude remoter Kindred of the whole Blood in the Collateral Line. (*o*) The Reason in Law is, because (as aforesaid) in a Transversal or Collateral Line the higher degree, though but of the half Blood, shall be prefer'd before a more remote degree of the whole Blood; which yet doth not hold in a Right Line, whether Descendent or Ascendent. And if a man dye leaving neither Children, Parents, Brothers, Sisters, nor their Children behind him; in this case the Uncles and Aunts concur in the Succession, and exclude all other collateral Kindred, because there are none others in the third degree

(*b*) Littl. l. i. c. 1.
& Britt. c. 119.
nu. 7. Fleta lib. 6.
c. 1. §. omnes
autem. & §. jus
etiam. & §. quan-
doque.

(*i*) Littl. ibid.
Coke l. 3. in Ra-
cliff's Case, fol.
40. b. & 41. a. b.
& 42. a.

(*k*) Littl. ibid.
paulo post.

(*l*) Grays. §. Suc-
cessio ab intestat.
9. 33.

(*m*) Ranchin.
Decis. par. 4.
Consil. 45. &
Alex. lib. 5. Con-
sil. 166.

(*n*) Boerli Decis.
302.

(*o*) Authen. post
fratres, de Legit.
hered.

gree as they. After these, then do succeed the Great Uncle and the Brothers Grand-children, to whom the deceased was a Great Uncle, all in a parity, because they are in the fourth degree. And here Note, that Nephews and Nieces succeed together with their Uncles and Aunts in the Goods of their Grand-Father and Grand-Mother, yet only for such a proportion and for so much as should have come to their Parent if he or she had been alive; for it is in a conjoyn'd not in a distinct sence that the *Jus Representacionis* is here in force.

4. It is a Question how far and to what degree collateral Kindred may succeed each other. The Civil Law puts a difference in this case between collateral Kindred by the Male Line, and collateral Kindred by the Female. It is said, that Kindred by the Fathers side may even in collaterals succeed even to the tenth degree *inclusive*; and by the Mothers side to the sixth degree. (p) For the Kindred by the Mothers side is not extended so far as that of the Fathers side, because, that by the Mothers side is only beholden to, and holpen by the *Pretor* or the *Pretorian* Law, but that of the Fathers side hath also the Civil Law to confirm it. But this difference or distinction being of no use or practice with us, let us not mistake upon this ground, and thereby without cause occasion our Theory to beget an Errour in Practice. For in very deed this difference or distinction is now removed by the Civil Law it self; for whereas the Old Law of the *Digests* and *Codes* did distinguish between Kindred by the Father, and Kindred by the Mother, now by a latter Law of the *Novels* this difference or distinction is abolished.

5. Lastly, if the deceased left no Children, but Kindred by the Ascendent and collateral Line; then for a yet clearer discovery of the Right of Succession distinguish thus; *viz.* Either he hath only Brothers of the whole Blood, or only such Brothers Children; or he hath Brothers by the half Blood, or such Brothers Children: In the first case the Brothers only succeed; in the second case only the Brothers Children; in the third case the half Brothers, and such Brothers Children succeed equally according to their Stock or Root, not according to the number of their persons. (q) Likewise if one dye, leaving one Brother and three Children of another Brother deceased of the whole Blood, the Brother alone shall have (as formerly declared) as much as the said three Children; and these do succeed exclusively to all other collateral Kindred. Also Brothers of the half Blood do exclude other collaterals Ascendent, as Uncles, Aunts, whether by the Father or the Mothers side, and that without distinction of Sex. (r) But put case a man dies without Children or Parents, leaving one Brother by the Fathers side only, another Brother by

(p) §. ult. Inst. de Success. Cognat.

(q) l. Pretor. ff. de Coll. 60.

(r) Auth. de heredit. ab intest. §. reliquam. & §. seq. C. de heredit. Auth. cessante. & Auth. Tres fratres.

the Mothers side only : for instance ; A man having had two Wives, and a Son by each, dies ; and the second Wife takes another Husband, having a Son by him ; then if the Son by the second Wife of the first Husband dies, he leaves a Brother of the half Blood by the Father, and a Brother of the half Blood by the Mother ; In this case the Civil Law says, that the Brother by the Fathers side shall succeed in the Goods that came by the Father, and he by the Mothers side in the Goods which came by the Mother, (s) and both of them equally as to all Goods otherwise acquired ; but our Law knows no such distinction, for they shall succeed equally, being equal in degree and equal in Blood ; because by Marriage all was invested in the Father.

(s) Cod. de Leg.
har. de Emanci-
pat. in fin.

The



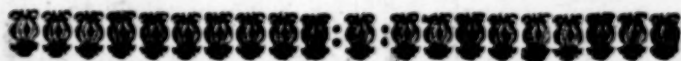
THE

Orphans Legacy

The Third Part.

OF

Legacies and Devises.



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THE ORPHANS LEGACY.

The THIRD PART.

OF Legacies & Devises.

CHAP. I.

Of Legacies and Devises in General.

1. *What a Legacy or Devise is.*
2. *What are the Requisites to the making of a good Devise.*
3. *Whether is more Considerable as to Legacies, the Time of making the Testament, or of the Testators death.*
4. *In what Court Legacies and Devises are properly Recoverable.*

1. **A** Legacy called a *Devise* at the Common Law, (a) is some particular thing or things given or left either by a Testator in his Testament (wherein an Executor is appointed) to be paid or performed by his Executor, (b) or by an Intestate in a Codicil or Last Will (wherein no Executor is appointed) to be paid or performed by an Administrator. (c) The Word *Devise* is specially appropriated to a Gift of Lands; The Word *Legacy* to a Gift of Chattels; though both are used promiscuously; For, a *Devise* is said to be, where a Man in his Testament giveth or bequeatheth his Goods or his Lands to

a) Terms of Law. Ver. Devise.

b) 5. 1. Inst. de Legat.

c) § non enim. Inst. de Codicil. Et l. ab Intest. ff. de Jur. Co. dict.

d] Terms of Law, ubi supra

another after his decease. (d) Observe, it is formerly said, That a Legacy is a particular thing given by last Will and Testament; For if a man dispose or transfer his whole Right or Estate upon another, That according to the Civil Law is called *Hereditas*, and he to whom it is so transferr'd is termed *Heir*; but at Common Law he is the *Heir* to whom all a mans Lands and Hereditaments do descend by right of Blood: And by the same Law the Word [Devise] from the French *Deviser*, is properly attributed to him that bequeaths his Goods by his last Will or Testament in writing; the Reason being, for that those Goods that now appertain only to the *Devisor*, are by this act distributed and divided into many parts. (e)

e] Cowell Interpret. verb. Devise.

2. To the giving of Legacies, or to the making of a good and sufficient Devise there are several things Required. The Person of the Devisor must be Legally qualified to Devise; the thing Devised must be such as is Legally Devisable; The Devisor at the time of making the Devise must have *Animum Testandi*; That the Devisee or Legatary be in his Person such as is capable of taking by Will or Devise; That there be no Coaction on the Testator, but that his Will be free and independent, without fear, force, or flattery, or other Sinister Contrivances; That the Devise be made in that due manner and form as it ought to be; That the thing Devised be Devised upon none other then (if any) Lawful Terms and Conditions; That the words of the Devise be such as do clearly declare the Mind and Intention of the Devisor; That Probate be made of the Testament; after the Devisors death; (f) And in case it be of Land, then that the Devisor be solely seized thereof in a Fee-simple Estate, and not joyntly with another, and that the Testament, wherein such Devise of Land is, be made in writing.

f] Perk. Sect. 406.

3. To find out the Testators mind and meaning, which is the very Index of the Testament, the time of making thereof is regularly more considerable in point of Legacies, then the Time of the Testators death, because the presumption of Law is, That his mind is not altered, (g) unless it may otherwise appear by sufficient Evidence. Therefore the Testators words are specially to be referr'd to the Time when the Testament was made, (b) and most especially if the Testators words be generall words. (i) So that if a Father bequeath to his Son, who is a student, all his Books, and after buy other Books, those other pass not by that Legacy. (k) Or if he bequeath 10 l. to his Parish Church, and after remove his Habitation into another Parish where he dyes, the 10 l. is due to the Parish wherein he lived at the time of making his Testament, and not to the Parish wherein he dyed. (l) Yet if the Testator bequeath any thing to his Kindred (in such general

g] L. tertius & cum qui ff. de Probat.

b] L. si ita legatum. de aur. & arg.

i] Barr. in l. ult. §. 1. de Leg. 2.

k] Balde Conf. 284. nu. 1. vol. 2

l] Rom. in Auth. Simile. E. nu. 93. & C. ad Leg. Falcis l. si cognatus.

o] Bald. in l. si cognatus.

ral words) the Kindred which were at the time when the Testament was made, are not so included as to exclude such as were his Kindred at the time of his death. (m) Also if a Testator bequeath his Moveables, such only are understood to be bequeathed as were the Testators when he made his Testament. (n) Likewise if the Testator Bequeath Releases to all his Debtors, there are no more comprehended in that Legacy then were his Debtors when he made his Testament. (o) Or if he give to a certain Hospital all his Moneys in the Bank, or in Bankers hands after his Debts paid, and there be at that time a 1000 l. in their hands over and above his Debts, and he lives so long that at his death there is 3000 l. in their hands above his Debts: In this case there is only one 1000 l. due by that Legacy to the Hospital, because the Legacy is to be computed according to what he had in their hands at the time of making his Will, and not according to what he had at the time of his decease. (p) Also if he Bequeath all his Moveables, having at that time Fruits of the Earth not separated from the Soyl, which yet afterwards and before his death are separated: In such case such Moveables pass not by that Bequest, because they were not Moveables at the time of making the Testament: (q) But this is not uncontroversial; for in this point there are some of the Learned of another Opinion. (r) Or if a Man Bequeath so many pieces of such a certain Coyne, which afterwards doth rise or fall in its value: The Legacy in that case shall be estimated as the said Coyne was in value at the time when the Testament was made, not at more nor less. (s) Also if a House with all things therein be Bequeathed, such things as the Testator afterwards brings into that House are not within that Legacie. (t) And here observe, That what has been said as to the Time of making the Testament, holds True likewise, and so is to be understood, as to the time of making a Codicil; the words whereof are chiefly to be refer'd to the time of the making thereof: Insomuch that in case by way of Codicil a man Bequeath all his wearing Apparel to his Wife, and after some Tract of Time makes a Will and dyes, no more Apparel doth pass by that Codicil (supposing it not contradicted by the Will) then the Testator had when he made that Codicil. (u) And yet notwithstanding all this which hath been said, that the Time of the making of the Testament is chiefly and specially to be refer'd to in the due Construction of Legacies, yet this is to be understood only when the words of the Testator speak of the time Past or Present; (w) Not when he speaks of the time to come by words of the Future Tense; (x) Nor when he speaks by such words of the Present Tense as cannot take effect but for the future. (y) Also when the Legacy is Universal under some Name Appellative, and in its Nature Collec-

m] Dist. 1. si cognatis.
n] Dist. 1. si ita.
De aur. & arg.
& Raph. Fulg.
Conf. 99. nu. 10
o] Aurel. 5.
1. de Liber.
Leg. & Fulg.
Conf. 37.

p] Paul. Cast.
in l. cum sti-
pulatur, nu.
3. de verb. obl.
& Jac. in l. si
quis 5. illud
nu. 10. qd.
quisq. jur.
q] Alciat. Conf.
182. lib. 9.

r] Paul. Cast.
Conf. 132. lib. 1
& Dec. Conf.
472. nu. 5.
s] Oldr. Conf.
31. l. uxorem
5. testam.

& Bald. de
Leg. 3. & l.
medico in
prin. de aur.
& arg.

t] Bened. Cap.
Conf. 45. nu. 5.
& Cor. Conf.
14. nu. 14. &
Paris. Conf. 80.
nu. 4. r. Vol. 2.

u] L. quia m
ff. de ju
Codicil.

w] Bart. in l.
his verb. in
prin. de Leg. 4.
x] L. filium de
aur. & arg.
y] Dist. 1. item
& Rol. Val.
Conf. 39. nu.
12. Vol. 4.

Give, as Herd, Flock, and the like; such a Legacy admitting of Increase and Decrease, the Time (in that case) of the Testators death is more to be inspected and considered then the Time when he made the Testament. (x) So likewise, if the Testator willeth

that such a one shall dispose of the Profits of his Estate, it shall be understood of such Profits thereof as were at the Time of his death; because the word [Profits] is universal; and therefore not to be restrained only to the time of the making of the Testament.

(a) Or if he Bequeath his Money in the Bank, the Profits thereof at the time of his death shall pass by this Legacy; (b) which (if you observe it) differs from that Case of money in the Bank abovesaid; also if the thing Bequeathed be such as is in ordinary use, and by using is consumed, and another of like kind had instead thereof, That other shall pass by this Legacy; for in such

case not the Time of making the Testament, but the Time of the Testators death shall be considered. () Nor is the Time of the Testaments making so considerable when the Legacy is Conditional; for then the performance of the Condition will fall under chiefest Consideration. (c) Also the Time of the Testators death, when it most tends to the upholding of the Testament, is more considerable then the Time of the making thereof. (e) And therefore, though the words in the Testament be of the Time

Past or Present, yet in that the Will of the Testator holds free and good even to his last Breath: They shall also Refer to the Future in those things that depend on the meer Will of the Testator, (f) And if he Bequeath Indefinitely his Corn, it shall be understood

all such as he hath at the time of his death. (e) Observe finally, That if the Testators words in a Bequest be doubtful whether they Refer to the Time Past, or to the Time to Come, they shall be understood to relate unto the time that is to come.

4. Where a Devise is made of Goods, if the Executor will not Deliver the same to the Devisee, he hath no Remedy by the Common Law; (i) but must have recourse against him by way of Citation out of the Ecclesiastical Court to appear before the Ordinary, to shew cause why he performeth not the Testators Will; for the Devisee may not take the Legacy and serve himself, but it must be Delivered to him by the Executor. (k) So that the Legatary hath no Remedy by the Common Law for any Legacy of Goods to him bequeathed, except (as that Law sayes) in case where some particular thing (as the Testators Horse, Signet, or the like) is bequeathed: (l) Or if the Testator willeth that his Executors shall sell his Land, and pay such and such Legacies out of the Proceed of the Sale thereof, in such case the Legatories may Sue at the Common Law for the same. But

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2) Peculium
in prin. de leg.
2. & l. greg.
de leg. 1.
o. an. 2. no. 2
2. l. an. 2.

a) Alciat. Cont.
173. nu. 4. lib. 9.
b) Jac. in l. cum
Ripulamur.
nu. 3. ad fin. de
verb. oblig.

c) Bart. in l. si
ita. nu. 8. de
jur. & arg. in l.
quid heredem
nu. 2. de. Tric.
Legat.

d) L. mea res
et l. cum qui.
Glos. de cond.
& demon.

e) Bart. in l.
place. nu. 2. de
Lib. & post.
f) L. 3. in fin.
de Adm.

g) Bald. in Rub.
C. de Verb.
sign. nu. 4.

h) Bart. in l. si
ita legatum. de
Cond. & dem.

i) Terms of
Law. verb.
Devise, & Off.
Exec. cap. 19.
in prin.

k) Ibid.

l) Broo. ut
Devise. nu. 3. 6.
14. 22. 30.

15. 16. 17. 18.
19. 20. 21. 22.
23. 24. 25. 26.
27. 28. 29. 30.

if the (m) Legacies be Bequeathed to be paid out of Leases and not out of Fee-simple Lands, then the Legatary may likewise Sue in the Ecclesiastical Court for the same; (n) For though Legacies are to be sued for in that Court only, yet the Ordinary cannot take Cognizance of Freehold devised, (o) And whereas it is said, That the Devisee may not take the Legacy and serve himself, but that it must be Delivered to him by the Executor, yet the Law is otherwise in Case Lands, or any Rents, or other Profit to be taken out of Lands, be Devised to a Man in Fee-simple, Fee-tayle, for Life, or Years; for in these Cases the Devisee may enter into, and take the thing Devised without the Executors leave for so doing. (p)

a) Mich. 3.P.
& M. Dyer. 10
141, 142. &
Mich. 29. & 30.
Eliz. Co. B.
Girneys case.
& Hob. Rep. 10.
264.
b) Brown Rep.
1. part fo. 34.
c) Perk. Sect.
576. 579. &
Dr. & Stn. lib. 2.
cap. 55. & Cow-
ells Inst. p. 146
p) Perk. Sect.
576, 577. etc.
Coke sup. Lit.
III.

C H A P. II.

Of Devisors and Devisees or Legataries.

1. What may be a Devisor or Devisee or Legatary.
2. What persons are incapable of being Legataries.
3. Whether an Infant in the Womb may be a Legatary; or a Feme Covert to her own Husband.
4. Whether Bastards may be Legataries.

Regularly, every one that is qualified to make a Testament may make a Devise of the same thing, whereof he may make such Testament; and whosoever is disabled to the one, is disabled to the other also. And therefore Infants under the age of 21. years may not be Devisors of Land; nor of Goods under the age of 14. as to the Male, or under the age of 12. Years as to the Female. (a) Nor may a Woman under Covert Baron Devise her Lands to her own Husband, or to others with or without his Consent. (b) Nor may any Ecclesiastical person or Member of a Body Corporate Devise the Lands or Goods which they have in right of the Church or Corporation. (c) So that every Devisor ought to be a person qualified to devise, and that both in respect of his Person and the thing Devised; he must also have at the same time *Animus Testandi*, and the thing Devised must be such as is Devisable. And as to the Devisee or Legatary, all such by the Civil Law as are incapable of Inheritances and Goods are excluded from being Legataries or Devisees, and indeed from being Executors. But every one by that Law that may be made an Heir or Executor, may also be a Legatary or Devisee; and as to any others; no Devise may be made: (d) Yet with this Difference, that the Executor must be a Person capable both when

a) L. q. 1. 1. 1.
ff. de Test. 5.
prateria. Inst.
quibus non est
permiss. fac.
C. sta. l. si frat.
C. qui testa. fac.
post. & l. ult. C.
de Testa. Mil.
& Perk. tit. De-
vise fo. 97.
b) Coke sup.
Lit. 112. 4. 61.
Broo. Devise
32.
c) Perk. Sect.
576. 579. &
d) Cod. de Her-
red. inst. l. 1. 1.

ff. de Harred.
 iust. l. si aliter
 §. de Extra-
 neis & Inst. de
 haz. qual. & diff.
 ff. de donat.
 caus. mort. in
 mortis & de
 Cond. Et de
 mon. Leumqui
 & ff. de iur.
 Fisci. l. non in-
 telligunt §.
 quando.
 8] Perk. 97.
 304. 505 & 9.
 H. 6. 23. & 2. El.
 115. Pl. 18.
 Dyer 13. Eliz.
 303. Pl. 46. Dy.
 & 300. Pl. 39. &
 5. l. 4. 6. per Bil.
 6] Lit. lib. 2. c.
 10. Sect. 8. 27.
 Affis. Pl. 60. 24.
 H. 8. Broo. De-
 vise 34.
 7] Perk. Sect.
 505, 510.
 8] Perk. 98.
 Sect. 510. 49.
 E. 3. 3.

1] Dyer. 303.
 304. B. R. curia.
 Mich. 3. Jac.

1] Dyer. 303.
 304. B. R. curia.
 Mich. 3. Jac.

1] §. incertis.
 iust. de Legat.
 Jo. An. Gem.
 Franc. in c. si
 pater. de
 Test. 6.

the Testament is made, and when the Testator dyes: (e) But it is sufficient for the Legatary that he be capable at the Testators death. (f) Indeed at the Common Law it is otherwise; for there a Devise or Legacy may be given to all persons to whom a Grant may be made, save in some few Cases; And the Devise ought to be good and sufficient in Law at the time of the Testators death: Therefore if a Man Devise Lands to an Hospital, or the like, when there is none such at the Testators death, though afterwards made or erected, such Devise is Null and Void: The Reason is, Because Devises at Common Law are Purchases, and he that taketh Lands by Purchase, must be capable to take the same when it falleth to him by the Purchase. (g) Thus by the Common Law the Devisee ought to be capable at the time of the death of the Devisor; which holds also True by the Civil Law: Hence it is, that though a Man may not grant nor give Lands to his Wife during the Coverture because they both are but one Person in Law, yet by Custom heretofore he might, and by Statute now he may Devise his Lands to his Wife to have in Fee-simple, or otherwise; because such Devise taketh not effect till the death of the Devisor, and then they are not one person. (h) So then Regularly whosoever may be a Grantee, may also be a Devisee or Legatee. (i)

2. For which Reason a Cominalty not Incorporate by the Kings Charter to Purchase Lands is Incapable; therefore if a Man Devise Lands Devisable in Fee to A. for Life upon a certain Condition, the Remainder to certain Men of a Fraternity, upon the same Condition, not Incorporate by the Kings Charter, and enabled to Purchase, this Remainder is void. (k) Therefore a Legacy given to an unlawful Colledge, is void; for by that is meant all Companies, Societies, Fraternities and other Assemblies, not so Constituted by the Prince, and therefore incapable of being Legataries. But generally a Devise may be good to any Person or Persons not specially rendred incapable by Law; for by the Civil and Ecclesiastical Law, the Legacy is void if it be given to an Heretick, Apostate, Traytor, Felon, Persons Excommunicate, outlawed Persons, Bastard, unlawful Colledge, as aforesaid, Libeller, Sodomite, Manifest and Notorious Usurer, except in some special Cases. And yet it seems that a Devise of Lands to any such Persons is good within the Statute of Wills. (l) Likewise an uncertain Person can be no Competent Legatary, no more then he is of being an Executor; inso much that if a Man Bequeath any thing to a person by a certain Name, without other description of his person, and there be more then one of the same Name known To the Testator, in this Case neither of them shall be Legatary by Reason of the uncertainty. (m) Hence it is that Devises made in these words, viz. To his best Friend, or to his best Friends,

arc

are void Devises. (n) Or to his Son A. B. when he hath two Sons of the same Name, unless you can help it by an Averment, which Son the Testator meant. but persons named Alternatively or Disjunctively are not so uncertain, but may be admitted as Legataries; And therefore if the Testator Bequeath 10 l. to A. or B. or to such or such a person, both of them shall have the Legacy equally betwixt them. (o) Because this word [Or] is in favour of Testaments taken for [and] (p) when it is so placed between two persons, either as to the appointing of Executors, or to the making of Legataries; unless it can be well proved, That the Testator did bear more affection to the one than to the other; (q) Or that he gave Authority to some other person of making the Election which of the two should be the Legatary; (r) Or when one of the persons is Incapable of being a Legatary for any of the Reasons aforesaid. And if the Devisor doth Bequeath to his Brother or his Children such a thing, saying, [I give to my Brother or his Children] in this Case upon the presumption of Affection, the Brother shall enjoy the Legacy during his life, and after him the Children shall be the Legataries: (i) But if it be Devised to him and his Children, then are both the Parent and his Children equal and Joynt-Legataries. (t) And whereas it is formerly hinted, That an Heretick may not be a Legatary or Devisee, understand it of an Heretick that is such at the time of the Devisors death; for it doth not prejudice the Legatary that he was an Heretick at the time of the making of the Testament, so as he be not one at the Testators death. (u) Add unto this Anabaptists; for the Law Civil and Canon excludes them also as Incapable of being Legataries. (w) But a person outlawed, though depending the Outlawry against him, he cannot Sue for his Legacy; (x) Yet he is not so properly said to be altogether Incapable of being a Legatary; as of being Incapable of Suing for his Legacy; unless the Outlawry be Reversed by some Error or discontinuance in the Suit, or unless the party Outlawed were beyond the Seas at the time of the Outlawry being pronounced; (y) Or unless there were some defect on omission of the Three Proclamations in such Cases by the Stat. required; (z) Or unless his pardon be obtained, wherein the words of the Pardon ought diligently to be considered; (a) For by force of the Outlawry the Legacy is forfeited and confiscate. Likewise a person Excommunicate is not so Incapable of being a Legatary, as unadmissable by the Ordinary to Commence any Suit for his Legacy during his persistency under such Sentence of Excommunication. (b)

b) Phil. Franc. in Rub. de Testa lib. 6. no. 32. & Grass. Thes. com. Opt. §. Institutio. q. 4. & Bald. in l. id quod pauperib. c. de Episc. & Cleric. no. 6.

c] Terms of
Law. Verb. De-
vise.

d] Fitzh. tit.
Alize. 27.

e] M. 19 J. 2. cur.
B. R. Crump.
vers. Bodie.

f] covar. de
spons. part. 2.
c. 8, §. 5, n.

g] 15, 16, 17. &
Jul. cl. ar. l. 5,
§. fornicat.

h] §. Incest.
& Auth. ex
complex. c. de

Incest. nupr. &
DD. ibid.

i] Glof. in
Auth. quib.

mod. na. effie.
fui. §. fin.

Clar. §. Test.
q. 31 m. 4.

j] c. cum ha-
beret de eo.

qui dux. in ux.
q. pol. per.

k] Adult. & l. le-
gatis ff. de ali-

ment. & Decio.
Neap. 164. n. 2.

l] 18, Eliz.
cap. 3.

m] Perk. tit.
Grant. f. 31 &

Braff. l. 2. c. 7.

n] Perk. tit. De-
vise. f. 64.

o] Jaf. in l. h. x-
reditas c. his

quib. ut indgn.
n. 7, 8.

p] Bal. in l. fi
quis incestus.

q] de incest. nupr.

r] Mich. 4. Ed.
6. Ander. Rep.

s] case. 82.
t] Hil. 4. Ed. 6.

u] Moo. Rep. m.
39.

3. If one Devise to an Infant in his Mothers Womb, it is a good Devise; otherwise it is by Feoffment, Grant, or Gift; For in those Cases there ought to be one of ability to take presently, or otherwise it is void. (c) And if one Devise his Land to his Daughter and Heir Apparent in Fee-simple, and the Wife of the Devilor be privily with child of a Son which is born after his death, Then is the Devise become good, for that now she is not Heir to her Father. (d) Also a Feme Covert may be a Competent Devisee or Legatary to her own Husband, as to such Lands, Goods or Chattels which he shall devise to her. (e)

4. Whereas Bastards, whether Bastards in simple Fornication, in Adultery, or in Incest, are without distinction incapable by the Civil Law of being Legataries, (f) yet understand this only where they are made Executors or Legataries, to their own natural Parents, for to any others they may be Executors or Legataries. (g) Also by the Ecclesiastical Laws they are capable of being Legataries even to their Adulterous or Incestuous Parents so far as is needfull or necessary for their convenient sustentation, or for their competent alimentation and relief. (h) Therefore have the Laws and Statutes of this Realm provided for the same purposes (i) which do also permit every Man as well by Deed executed in his life time, (k) as by his last Will and Testament to be executed after his death (l) to give or devise to any of their Bastards without distinction, all their Lands, Tenements, Hereditaments without restraint. And by the civil Law the lawful Children of Bastards may be Legataries to the Adulterous Grandfather, (m) but not to the Incestuous Grandfather. (n)

(o) If a man possessed of Goods devises the same to his Son when he shall attain to the Age of 21. Years, and in case the Son dye before that Age, then one of his Daughters to have the said Goods, and the Son die before the said Age. The Question is, Whether the Daughter shall have the Goods immediately upon and after the Sons death, or whether she shall stay till the time that the Son should have been of that Age in case he had so long lived. The opinion of all the Justices was, That she shall have the goods immediately upon the Sons death.

(p) A Man had Issue a Bastard, and after Intermarries with the same Woman by whom he had that Bastard, and hath Issue Two Sons by her, and then Devised all his Goods to his Children. It is by every one supposed, That the Bastard shall have nothing, for that he is *Natium Filius*. In that case it is clear that a Bastard shall not take by a Grant. But *Q*u as to a Devise. And if the Mother of the Bastard make such a Devise: It is clear, That the Bastard shall take thereby, because he is certainly known to be the Child of his Mother.

C H A P. III.

Of Words and Expressions sufficient for Legacies.

1. Any Words, whereby the Testators mind or meaning is express'd or implied, are sufficient for Legacies.
2. Legacies are not destroyed by Words impertinently used by the Testator in the Bequest.
3. That words carrying a false demonstration, shall not vitiate and null the Legacy; Also how this is to be understood.
4. Whether a Legacy may be Bequeathed only by the Testators Signs, Becks, or Nodds, when he can speak articulately.
5. Whether a Legacy shall pass by Words only Implicatory of a contrary Condition:
6. In point of Legacies the Testators meaning express'd by Words, is more to be heeded, then when implied by Deeds.
7. The Testators Words by Implication may be such, as may make the Legacy greater Casually, then he plainly express'd Originally.

1. **I**F a Man in his last Will and Testament says, I do give, bequeath, devise, order, or appoint to be paid, given or delivered; or my will, pleasure, or desire is, That he shall have or receive, or keep, or retain; or I Dispose, or Assign, or Leave such a thing to such a one; or let such a person have such a thing; or any other Words whereby the Testators Mind or Meaning of Bequeathing is expressed or sufficiently implied, shall be significant enough whereby the Legacy shall pass, provided no other Legal Obstacle stand in the way; because it is not in last Wills and Testaments as in Deeds; for in Deeds the Words do fall under a stricter examination then the intention, or the mind; but in Wills and Testaments the Testators Mind and Meaning is more valuable and of more efficacy in Construction then his Words, so long as the Interpretation of his Mind and Meaning hold a Conformity with his words, nor is oppugned by any other part of his last Will and Testament.

2. A Testator in making a Bequest may possibly speak such words as may be very impertinent, yea and in themselves altogether untrue, and yet the Legacy not destroyed: As thus; viz. If I give and Bequeath my Field *Long-acre* to A. B. beyond, above, besides, more then, or over and above the *Black Horse*, which I had of him in Consideration of the Ten pounds which he owed me: This *Long-acre* is a good Devise or Legacy to A. B. albeit the

Testator never had any such *Black Horse* of him, and although he never owed him any such *Ten pounds*; The Reason is, because the said words, [above, beyond, &c.] in this sense, and in this case are Inclusive, and are so to be understood and interpreted.

a] *Surd. Decif.*
285, & *Arcin.*
in *I. qui ita ff.*
de Dot. præleg.
& *Bart. ibid.*
Mantic. l. 9, tit.
3, nu. 32, &
Menoch. de
Præfump. lib.
4. præf. 145, &
Perigrin. de
Fidei Comiff.
art. 16, nu. 18.

(a) So that,

3. A false Demonstration shall not vitiate a Legacy; Inasmuch that if the Testator, who hath Bequeathed nothing to A. B. do say, That out of the Hundred pounds which I have Bequeathed to A. B. I do give Fifty to C. D. If in this case it be questioned whether any thing be due to A. B. And what is due to C. D. The Answer is, That Fifty Pounds are due to C. D. although nothing be here Bequeathed to A. B. because a Legacy shall not be vitiated or nullified merely by a false Demonstration; But to A. B. nothing is due; because it was not the Testators mind to Bequeath any thing to him, but rather to lessen or diminish it, if any thing had been given him; For a Deminution, Ademption, or taking from in such case hath its operation to evince by how much the less, not by how much the more the Legacy is due. (b) But if the Testator say, I Bequeath 100 l. to A. B. beside my Field *Long-acre*: In this case *Long-acre* is presumed to be Bequeathed as well as the Hundred Pounds. And whereas it is here said, That a false Demonstration doth not vitiate or make void the Legacy: Understand it thus, That is, if the Demonstration be altogether and totally False: But if it be False only in part, Then the Legacy is void only for that part, and it may hold for another part. (c) To this may be added Case, If the Testator say, I Bequeath to A. B. the Hundred pounds which I have in my Chest; there is nothing due to A. B. and the Legacy is void, if it be not in his Chest; (d) because he that so says, doth not Bequeath a Hundred pounds simply; but the Hundred pounds in his Chest: And these words [which are in his Chest] doth demonstrate, That the Testators meaning was to Bequeath rather by way of certainty, as to the Species or Corpus, then as to the quantity.

b] *L. 14, de*
admi. leg.

e] *Rebuff. ad l.*
Appellatione
verf. Tertio.
de verb. Sign.
d] *L. si Servus*
§. qui quinq;
ff. de Leg. 1.

e] *Menoch. de*
Præfump. lib.
4, præfump.
105, nu. 2.
f] *Mantic. lib.*
6, tit. 4, n. 1.
g] *Covar. cap.*
cum tibi. lib. 2,
var. Refolut.
h] *Math. ad*
Guid. Pap.
quest. 459.
i] *Admona-*
tor. ad Gomez.
var. Refo. tom.
1, c. 12, v. 2.

4. If the Testator say, I Depute such a thing to A. B. Or I Align such a thing to C. D. This is a good Bequest or Legacy; (e) Yet withall here observe, That a Legacy may be Given or Bequeathed only by Signs, or Becks, or Nodds, by the Head, Hands, or Eyes. (f) But this is more clear and less Dubitable, when a Legacy in such manner is left by a Testator, who by Reason of the violence and surprize of some Disease is deprived of his Speech; (g) at least of speaking articulately, though not deprived of his Speech totally. (h) The greatest doubt is concerning him, who though he can speak articulately, yet doth Bequeath by Signs or Nodds; for some are of Opinion, That such cannot dispose of a Legacy in that manner: (i) But this is com-
monly

only rejected as the more unsound Opinion. (k) Now a Legacy is then understood to be left in this case, when the Testator being asked by some one whether he will leave a Hundred pounds or such a thing to himself or some other, doth not Answer to the Question, but by Signs or by Nodding his Head, shewing a pleased or displeased Countenance, or by other motion of the Body doth plainly discover his Will and Pleasure therein.

l) Math. ad
dist. quæst.
459, & Gomez.
dist. c. 12, p. 2.

5. Suppose the Testator speak only after this manner, *viz.* If my Son A. B. Marry with C. D. let not my Executor give him a Hundred Pounds; whether from these words by the contrary sense is the Legacy of a Hundred Pounds understood to be left to his Son A. B. under the contrary Condition, *viz.* If he do not Marry with C. D. This is held in the Affirmative. (l) Yet this would not hold if he should appoint an Executor after this manner, and say, If my Son A. B. Marry with C. D. let him not be my Executor, or one of my Executors: The Reason is, because an Executor may not be Instituted, nor the Office of an Executor inferred only by Conjecturals. (m) Again, a Legacy taken away under a Condition, is not only from thence understood to be given under the contrary Condition; because a Legacy due only under a Condition, may not be argued or inferred from a contrary sense by force of a bare ademption, but by force of a Legacy formerly so Bequeathed as may not be understood to be taken away though the Condition fails, but only when the Condition takes place or effect. (n)

l) Mantic. lib.
3, tit. 17.

m) Mantic. dist.
tit. 17, nu. 2.

n) Mantic. ibid

6. In Cases doubtfull touching Legacies, and the Testators Mind or Meaning as to the same, Recourse must be had rather to what he doth Express by Words, then what he doth imply by any Acts or Deeds, when there appears any discrepancy between them. Hence suppose a Parent having divers Sons and Daughters, doth appoint them all his Executors, and to his eldest Daughter doth deliver all his Keys and his Signet Ring which he commonly used; And having delivered these to her to keep, doth withall Order and Assign, That his said Daughters, Son, or Servant, (be it expressly either) shall have such Apparel, Moneys, or other things as he hath in his Care, and under his Custody: Whether in this case doth the Parent seem to Bequeath to that eldest Daughter whatsoever is under Lock, shut up, or Sealed. The Answer is in the Negative. (o)

o) L. cum pater
§. pater
pluribus ff. de
legat. 2.

7. Lastly, The Testators words may possibly be such, and carry in them such a sense by direct implication, as whereby the Legacy may casually become greater then at first was apprehensively express'd by him. For Explanation whereof add to the former this one Memorable Case more. Suppose a Legacy be

1. ult. §. 1. de
 Dol. Excep. &
 Roman. Singu.
 535.
 7 Hill. 14, Jac.
 B.R. per Cur.
 Rol. Abridgm.
 tit. Execur.
 Litt. X.
 7 Mich. 24, E-
 liz. *Wraffs* Case.
 Moo. Rep. nu.
 314, Stat. 34,
 H. 8, 32, of *Wills*

given by a Testator to the Son of him who is indebted to the Testator; adding withall these Words, *viz. I should or I would leave him more, if his Father had paid me what he owes me.* In this case it is held, That if afterwards that Son happen to be his Fathers Executor, he is by these Words freed from that Debt which his Father owed to the Testator. (p)

(q) If there be a Devise of a Legacy to one and his Assigns, though the Devisee die before Payment, yet his Administrator shall have it as his Assign.

(r) *Amerjam* said to *Moore*, That *Popbam*, now Chief Justice of *England* held in his Readings, That if one by a Letter express his Will for the Disposal of his Lands, it is sufficient: For it was the Case of one *Weast*, who went beyond Sea, and wrote such a Letter, wherein he will'd, That his Lands should go in such manner. And it was held a good Devise.

CHAP.

CHAP. IV.

Of Conditions and their Resemblancies Incident unto Legacies.

1. A False Necessary Demonstration doth vitiate a Legacy, but not a False Superfluous Demonstration.
2. The Parity of Operation between a False Cause and a False Demonstration; and whether a False Cause doth vitiate a Legacy?
3. Whether a False Condition doth vitiate a Legacy.
4. The Difference between Modus and Conditio.
5. In what Cases the Word [if] doth not amount to a Condition.

1. **W**Hat Conditio is, or by what Words it is express'd or implied, with the several Kinds thereof incident to Testaments, hath been formerly hinted at. (a) And as a Condition relates to Legacies: It is such a Quality added or annexed to the Devise or Legacy, as whereby the effect thereof is suspended, till some future Event, whereon it depends, doth come to pass. For in the Bequeathing of Legacies, as well as in the Appointing of Executors, there is for the most part either That which the Law calls *Conditio* or *Modus*, or *Causa*, or *Demonstratio*; The two former whereof refer to the Time to Come; The two Latter to the Time Present or the Time Past. And a *Demonstration* is instead of the Name of Persons or Things, and is nothing else but a Note and Designation, whereby either the Person of the Legatary, or the Legacy it self is Demonstrated: For which Reason a Legacy is not rendred Void or Null merely by Bequeathing it by a False Name, or through a meer Erronious Appellation only Demonstrative, so as the thing Bequeathed be certain, and Person of the Legatary not uncertain. (b) So likewise is it in case of a false Demonstration, which doth no more vitiate the Legacy, then if it were given by a wrong Name. (c) As if the Testator say, I Bequeath *Bucephalus* my Black Horse of my own breed, or which was a Fole of my White Mare; This Legacy is good, though he were not of his own breed, or a Colt or Fole of his White Mare. But understand this only when the Demonstration is too full or superfluous, and not of a Demonstration which is no more then Necessary, and which respects the very Substance of the thing Bequeathed. Now a Demonstration is said to be too full and

a] *Supra* part.
1, cap. 13, 14.

b] §. Siqui-
dem. *Inst. de*
Legatis.

c] §. Falsa.
Inst. Ibid.

superfluous,

superfluous, when it is added to a thing certain and sufficiently Demonstrated before, and which ~~would~~ plainly enough appear without any such Addition of that Demonstration; and of such Demonstrations only it must be understood what is here said, viz, That a false Demonstration doth not vitiate the Legacy. And as a superfluous Demonstration that is in it self False doth not vitiate the Legacy, when it is such a false Demonstration of the thing Bequeathed, so neither when it is added to the Person of the Legatary, (d) And here note, That a Demonstration hath more Energy, Force and Operation in it then a meer Name: And therefore if the Testator hath Two Daughters, the one Married at London, viz. A. B. and the other Married at York, viz. C. D. doth say, That I Bequeath 100 l. to C. D. my Daughter, which is Married at London; in this case the Legacy of the 100 l. is due to A. B.

d] L. Demonstration de Condit. & Demon.

e] Pap. Not. 1, tit. de Legat. vers. de Pareil. &c.

f] Rebuff. de dilat. art. 2, gl. 2, nu. 18.

(e) In like manner a Demonstration by the Quality is of more Force then that which is by the Confines, Bounds, or Limits of Place; Therefore if a Testator doth Bequeath his Cherry-Garden, being in such a Place, nigh such Neighbours, it is a good Legacy, and due; albeit it be not in that Place, but in another.

(f) So that it is not a False Superfluous, but a false Necessary Demonstration that doth vitiate the Legacy, and that which respects the very Substance of the Thing it self Bequeathed: For from thence it is, That (as in the last precedent Chapt.) if the Testator say, I Bequeath Ten Pounds which I have in my Chest unto A. B. Nothing is due to him if it be not in his Chest; because in this case the Demonstration is inherent to the very Body or Substance of the Thing it self Bequeathed.

2. What hath hitherto been said of a False Demonstration, the same in Law may be Applied to a False Cause, or a False Ground or Reason; for as a Legacy is not vitiated by a Superfluous False Demonstration, so neither is it by the Addition of a False Cause or Reason. (g) And as by a Demonstration it is signified to whom and what is Bequeathed: So by the Cause or Reason it is shewed why or wherefore it is Bequeathed. Hence it follows, That if the Testator say, I Bequeath 100 l. to A. B. for that the Structure or Building of his House was prosecuted and went forward, or the like: In this case the Legacy is due, though that Cause were not True; (h) Yea whether the Testator did or did not know the Cause to be False; (i) Unless the Cause be such as is Inherent with, and taken for the very Substance of the Legacy it self; in which Case a Bequest or Legacy is void by a False Cause; or unless the Testator declares the Cause Conditionally, that is, in the same manner as a Condition uses to be declared, as by the word [if,] As when the Testator says, I Bequeath a Hundred Pounds to A. B. if he hath taken care of my Business in London,

g] §. longe. Inst. de Legat.

h] Rebuff. ad l. 27, vers. ideo. De Verb. Sign. i] Gomez. Var. Resol. in Tom. 1, cap. 12, nu. 76.

London: For every Cause though it be Conditionally spoken or after the manner of a Condition, yet it refers to the Time Past; whereas a Condition refers to the Time to Come. Therefore it is very material to consider whether the Testator doth express himself Causatively, as by the Word [Because] or Conditionally, as by the Word [if:] For if Conditionally, and the Condition be under a Fallity, then the Legacy is not due; but it may be otherwise though the Cause be False; unless it can be proved that the intention of the Testator was otherwise. Now the mind or the intention of the Testator may be proved either Truly or Presumptively; Truly, if the Testator fully expresses himself; presumptively, when the Cause doth respect or refer to Consanguinity or Affinity: As when the Testator says, I Bequeath a Hundred Pounds to A. B. because he is my Brother or Kinsman. (k) Others in this point of a False Cause do distinguish between an Impulsive Cause and the Final Cause, and conclude thus, viz. That the Impulsive Cause doth not vitiate the Legacy, but that a Final Cause doth. (l) In all which variations and doubts the Testator's Mind and Meaning so far as is Rationally Colligible, must turn the Scale. To conclude therefore this Point: If the Testator says, I do Bequeath a Hundred Pounds, because he lent me a Hundred Pounds, This Legacy holds not if the Cause be False: Yet if he says, I do Bequeath the Hundred Pounds to A. B. which he lent me, this Legacy is good, though nothing were lent him. (m)

3. Again, it may be a Question, whether a False Condition doth vitiate a Legacy? Some are of Opinion That it doth vitiate a Legacy: (n) As if the Testator say, I Bequeath a Hundred Pounds to A. B. if he pay to C. D. what I owe him; when the Testator owes nothing at all to C. D. which some will understand only when the Condition is Originally False and *ab initio*; for if it be False only *Ex post facto*, as if the Testator did owe him indeed; or was indebted to him a Sum of Money, but paid it to him after he had made his Testament, the Legacy is notwithstanding due say some, but contrary to Truth and Law. (o) So that the Condition which is False *ab initio* is held as an impossible Condition, and therefore voids not the Legacy: And on the other side, That Condition which is False *ex post facto*, is held as Defective, and for that Reason doth not Void or Null the Legacy. (p)

4. *Modus* and *Conditio* are distinguished from each other by certain Notes, Signs or Forms of Words or Speech: as thus, The common Note or Word by which a Condition is usually known, is by the Word [if:] And that whereby *Modus* is commonly conceived and known is by the Words [That, or So as:] Therefore

(k) Gomez. Var. Refol.

Tom. 1, cap.

12. nu. 76.

(l) Menoch. de

Præsump. l. 4,

præf. 14 & Gal-

gan. de Cond.

part. 2, c. 4, q.

1, 2.

(m) Ibid. Me-

noch. præsum.

24.

(n) Leon. Gal-

gan. de Cond.

part. 1, cap. 5,

nu. 26.

(o) L. cum tale.

§. p. n. de.

Cond. & De-

mon.

(p) Cujas. indist.

§. pen.

q] L. utilitas.
§. 1, de ma-
num. test.
r] L. si ita ibid.
& dict. L. utilit.
ibid.

s] Gomez.
Var. Resol. To.
1, cap. 12, nu.
70, & Gratius.
§. legatum. q.
49, 58, & valq;
de success.
progr. lib. 3, §.
27, nu. 15, &
Mantic. lib.
10, tit. 5, nu.
15, 16.

r] Menoch.
Conf. 131. lib. 1

y] L. in condi-
tionib. §. 1, de
Cond. &
demon. & l. 2.
de his quæ
pæn. nom.
w] L. mutuo.
§. 1, ff. de Tutel.

] §. Condi-
tiones. Inst. de
Verb. Oblig.

fore if the Testator says, I Bequeath Ten Pounds to A. B. so as he give Five Pounds to G. D. This is only *Modus*. (q) But if he had said, I Bequeath Ten Pounds to A. B. if he give Five Pounds to C. D. Then it had been a Condition. (r) Yea though the Testator add a Condition to the *Modus*, yet the Word, [That] implies a *Modus* not a Condition: As thus, I Bequeath Ten Pounds to A. B. on Condition that he give Five Pounds to G. D. (s) Yet in some cases the Word [That] may rather imply a Condition then a *Modus*, especially if it can be Proved, That the Testators meaning was, That the Legatary should fulfill what is enjoyn'd him before he should enjoy the Legacy. Hence it is, That it may be judged from the Method and Order of the writing of the Words themselves, whether it be a *Modus* or a Condition: For if the Testator doth first enjoin a charge or a burden before he doth make the Disposition or give the Legacy, then it is to be understood as a Condition: As thus, If the Testator say, That let A. B. give my Son G. D. Five Hundred Pounds, and take all my Goods; or let him give him Five Hundred Pounds and be my Executor. It is otherwise when a Charge is joyned with a Grant or Disposition that in it self is already perfect and compleat: As thus, If the Testator say, I make or appoint A. B. my Executor under this Condition, that he Succeed not in, or Possess himself of my Estate till my Legacies be paid. (t) And this is a current Rule, That whenever it may clearly appear that it was the Testators Intent and Meaning to make a Condition, it shall be understood as a Condition though he used words that are properly *Modal*; and whenever it can likewise be proved that his Meaning was to make a *Modus*, it shall be understood only as *Modal*, though he used words that are properly *Conditional*. (u)

5. There are certain Cases wherein the Word [If] doth not amount to a Condition; one is, when the Condition doth refer to the Time Present or Past, (w) As if I say, If A. B. hath made me his Executor, let C. D. be my Executor; or if A. B. hath given me a Hundred Pound, let C. D. have a Hundred Pound; For this kind or manner of Speech being then presently *ab initio*, either True or False, doth not suspend the Executorship or Legacy, but hath its operation *ad statim*, either to their Confirmation or Annulment. (x) Another Case is when the Executors or Legataries are made in this manner, *viz.* Let A. B. and C. D. be my Executors as to the parts which I shall Appoint or Assign them; or let them be my Executors if I Assign them any parts; or let them be my Legataries as to the parts which I shall Appoint, or if I Assign them any parts; In this case it is held that they are not Appointed Executors or Legataries under a Condition, but that such making Executors or Legataries

is valid and good, albeit the Testator should afterwards Assign them no parts: The Reason is; because such a kind of Speech doth admit a double Sense or Interpretation, and is as if the Testator had added; And if I Assign no parts, let them be my Executors or Legataries in equal parts. (y) Several other Instances might be given to shew wherein the Word [if] doth not make a Condition; but these may suffice, our purpose on this Abridgement being not to insist longer in Instances than what are sufficient for illustration. y) L. 2, de Inst.

C H A P. V.

Of the several Marks and Kinds of Conditions, and Questions in Law touching the same.

1. This Subject of Conditions very Voluminous in the Law.
2. The several Words and Phrases of Speech denoting Conditions.
3. The Divers kinds of Conditions.
4. Several Questions in Law touching Conditions, Resolved by Mr. Swinborne, and others learned in the Law.

THIS Subject of Conditions, with their several Marks, Notes Signs, Differences and Variations, with their Ampliations and Restrictions or Limitations, both as to the appointing of Executors, and Bequeathing of Legacies, is a Field so large in the Law, as indeed would of it self require a very large Volume to reduce them all though but to a *Compendium*, indeed too vast a Body to be Compriz'd in such an Abridgment as this is; you may well guess that this is a Provident Truth to obviate over-curious Expectations, rather than any lazy Excuse to save Labour, if you seriously consider by what variety of Words and Phrases; by what multiplicity of Senses, Constructions and Interpretations; and in what innumerable Cases Conditions are made.

2. As When and in what Case a Condition may be made by these words following, viz. [If. So as. Provided. To the intent. On Condition. To the purpose. That. When. Whereas. In case. So that. To. After. Afterwards. After that. So long as. Until. Who. Which. Whensoever. Whosoever. What person. Which person. Except. Otherwise. Where.] With many others. As also if you consider in what cases a Condition referring to the Time Present or Past may improperly be a Condition; Also when an Argument is drawn from the contrary sense, may have place in Conditions; Also what the Difference is between [If] and [when;] and in what

what Cases the Disjunctive word [Or] placed between two Phrases of Time to Come, shall disjunctively infer a Condition; also when such a Conjunction Copulative (as Noting one thing necessarily to precede, another shall follow) doth make a Condition; Also, whether Adverbs of Negation make a Condition or only a *Modus*; And whether every Adverb that suspends the Disposition till some future Event, doth make a Condition; Also in what Cases and when Prepositions do make a Condition; And in what Cases Pronouns do the same; Likewise when Relatives as to Substance, Quantity, Quality or Number do make Conditions; Also by what words, and when are Tacite Conditions, and how many ways such may be made; And whether a Condition by Relatives be not a Tacite Condition; Also whether a Condition may not be made by Participles spoken Absolutely; And although Participles of the Time Present or the Time Past, do not make a Condition, yet whether Participles of the Future Tense may not make a Condition; Also when and in what Cases Gerunds may make a Condition; As also in what Cases the bare mention of a Condition doth not always make the Disposition conditional. *Cum multis aliis.*

3. Of Conditions there are many kinds, whereof some be Necessary, some Impossible, some Indifferent or Possible. The Two former are void *ab initio*. Of necessary Conditions some are Termed so in respect of Fact, some in respect of Law. Impossible Conditions are such either in respect of Nature, or of Law, or of the Person enjoy'd, or in respect of Contrariety, Repugnancy, Perplexity, or Incompatibility. And of Possible Conditions some are Arbitrary, some Casual, and some Mixt. Of which Possible Conditions some consist in Chancing, some in Giving, some in Doing, some Certain, some Uncertain; Respecting either Time, or Place, or Persons, or things; whereof also some are Affirmative, some Negative.

4. There are also in the Law almost innumerable Questions relating to this Subject of Conditions; To Enumerate some of them, as whether Impossible or Dishonest Conditions do make the Disposition Conditional? whether Necessary Conditions make the Disposition Conditional? What are the various effects of Conditions, whether Necessary, Impossible, or unlawfull Conditions do suspend the effect of the Disposition? Whether Conditions partly certain, partly uncertain, do suspend the effect of the Disposition? Whether Impossible Conditions which the Testator supposed to be Possible do suspend the effect of the Disposition? Whether Conditions that are very hard and almost Impossible do suspend the effect of the Disposition? Whether it be not sufficient for an Executor or Legatary to accomplish the Condition by some Equivalent means, though not in the

punctual

punctual and precise manner prescribed by the Testator? Whether Conditions at first Possible but afterwards becoming impossible do hinder the effect of the Disposition? Whether Conditions Impossible by reason of Repugnancy, Contrariety, Perplexity, or Incompatibility do not make void the Disposition? Whether the Condition be not in Law held as accomplished, when it is not the Executors or the Legataries fault wherefore it is not performed? Whether when the Condition is Negative, the Legatary may not have his Legacy, entring first into Caution for Restitution thereof in case such Condition be not kept and performed? Whether every Possible Condition ought to be observed precisely? Whether and in what cases the Legatary may obtain his Legacy before the accomplishment of the Condition? Whether it be sufficient that the Condition was once performed, though it doth not continue so? Within what time the Condition may or ought to be performed when no certain Time is limited by the Testator? In what sense that common Condition [*if he dye without Issue*] is to be understood, and when it may be said to be accomplished? Whether the Natural as well as the Lawful Issue be to be understood by them words? Whether that Condition be accomplished if he die leaving his Wife with Child which is afterwards born? Or whether in case he hath a Child, but dyes before his Father? Whether there be any Difference, and what that Difference is, betwixt this Condition [*If he dye without Issue,*] and This [*If he have no Issue?*] What the Law is in case the Issue be born dead? Or dyeth as it is born? What course to be observed in Legacies, where more then one are born at the same birth? Whether the Condition of payment to be made to an Infant be performed by Payment made to his Guardian? Whether he in whose favour a Condition is made may not consent to other means of performing the Condition then was prescribed by the Testator? Whether a precise performance of a Condition be not understood only of Voluntary Conditions, and not of Necessary Conditions? Whether such precise performance of a Condition be Requisite when the Legacy is in favour of the Testators Children, or *ad pios usus*? Whether the Condition may be performed by another person then him that is Nominated in the Condition? Whether casual Conditions may in any case be reputed as accomplished before the Event? In what cases casual Conditions be reputed as accomplished, albeit the same be not so indeed? Whether a Condition doth prejudice the Executor or Legatary when the Testator himself doth hinder the performance thereof? Whether a Condition doth prejudice a Legatary when the performance thereof is obstructed by a Third Person? Whether the accomplishment

of a Condition hindred by casual means shall prejudice the Legatary? In what cases an Affirmative Condition doth imply a Negative? What the Law requires of the Legatary, as to Bond or the like, when the Condition is not performable during Life? Whether a Negative Condition is said to be accomplished when it cannot be infringed? What if the Party be already Married, to whom any thing is Bequeathed Conditionally, [if he shall Marry?]. Whether the Condition shall be reputed as accomplished, if the Legatary were once willing, and afterwards becomes unwilling? What are captions Conditions, and how they shall not prejudice the Legatary? Whether a Legacy given with a Condition dependent on the will of another then the Testator himself, be not a void Bequest? What the difference in Law is between the Testators referring his will to the Absolute, and to the Limited will of another? Whether he to whom the Testator commits the Disposition of all his Goods be not Executor or Universal Legatary? How far the Conditions of Legacies or Executorship against the Liberty of Marriage be Lawful? How far as to Legacies or Executorships the Condition of Marrying with the Arbitrarent, Will, or Consent of another is Lawful? Whether the Condition of forbidding the Alienation of the Legacy is Lawful? In what cases the Legatary may Alienate the Legacy, notwithstanding such prohibitory Condition of Alienation? Within what Time the Condition may and ought to be performed by the Legatary when no certain Time is set or Limited by the Testator? Whether the Condition may be performed during the Time betwixt the making of the Testament and the death of the Testator? Whether a Legatary must not perform an Arbitrary Condition as soon as he can? Whether any Time doth prejudice a Legatary whilst he is ignorant of the Condition? Whether a casual Condition may not be accomplished at any time? With innumerable other varieties of Conditions well known to such as are acquainted with the Law; whereby you may now by this time readily perceive it was a Truth which was formerly hinted. That to Treat of this Subject of Conditions as to Executorship and Legacies, and to do it distinctly, though not in the Amplitude of their due Dimensions, but by way only of a compendious Contraction, would of it self require a very Voluminous Tract; Being therefore bound up to the Laws of an Abridgment, we may not Sail into the Vast Ocean of the Laws to fetch you home any Transmarine Resolutions to the said Questions, but shall only refer you to our own Countreyman, in this Profession the Learned Mr. *Swinborne*, and others who of this Subject have written very Copiously, yet Succinctly.

C H A P. VI.

What things are Deviseable by Will ; And whether a Testator may Bequeath what is not his own.

1. *What things in particular may be Devised or Bequeathed.*
2. *In what Case a Legacy given by a Testator, of a thing that is not his own, may be good or not.*
3. *How a Testator may Bequeath what is his Executors.*
4. *A Bequest to one of what was his own before, is void.*
5. *The Difference between the Common and Civil Law, in this Point of Devising what is another Mans, and not the Testators.*
6. *Goods in Joynt-tenancy not Deviseable.*

1. **R**egularly and Infallibly all things that come to Executors, or that at the Testators death, can be Assets in the Executors hands, were Deviseable by him in his Life. More particularly, All the Testators Goods and Chattels, whether Real and Immoveable, or Personal and Moveable, whereof he dyed actually Possessed or Interested in Expectancy, in his own and not in anothers Right, nor in Joynt-Tenancy with another (saving in some certain Cases in the Law specially excepted) are Deviseable; As now also are Lands, Tenements, and Hereditaments, whereof some are Deviseable by Custom, as Gavel-kind, and Burgage Tenure; others by virtue of certain Statutes. But more specifically; first, as to Chattels Real, all Leases in Lands or Houses, either for Years, or Years Determinable upon Life or Lives, or by Extents, Statutes, or Recognizances, or Rents (not Rents reserved by the Inheritor, yet the Arraerages of them also.) Likewise Commons, Advowsons, Tithes, Faires, Markets, Profits of Leet, and the like in the Testator for Years, and all such Creatures as a Termer hath in a Warren, Park, Pond, Dove-house, or the like in the Testator for Years. Secondly, as to *Chattels Personal*, all Debtors taken in Execution, Captives, Apprentices, all Cattle, of all kinds, Creatures naturally Tame, or being otherwise, are by Act reduced thereto, as Hawks reclaimed or the like, also Hounds, Greyhounds, Spannels, Mastiffs, Ferrits, and the like; also all Merchandable Goods and Commodities whatever; Likewise Ships and other Vessels Naval with their Guns, Rigging, Tackle, Apparel;

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6. *Goods in Joynt-tenancy not Deviseable.*

1. **R**egularly and Infallibly all things that come to Executors, or that at the Testators death, can be Assets in the Executors hands, were Deviseable by him in his Life. More particularly, All the Testators Goods and Chattels, whether Real and Immoveable; or Personal and Moveable, whereof he dyed actually Possessed or Interested in Expectancy, in his own and not in anothers Right, nor in Joynt-Tenancy with another (saving in some certain Cases in the Law specially excepted) are Deviseable; As now also are Lands, Tenements, and Hereditaments, whereof some are Deviseable by Custom, as Gavelkind, and Burgage Tenure; others by virtue of certain Statutes. But more specifically; first, as to Chattels Real, all Leases in Lands or Houses, either for Years, or Years Determinable upon Life or Lives, or by Extents, Statutes, or Recognizances, or Rents (not Rents reserved by the Inheritor, yet the Arraiges of them also.) Likewise Commons, Advowsons, Tithes, Faires, Markets, Profits of Leet, and the like in the Testator for Years, and all such Creatures as a Termer hath in a Warren; Park, Pond, Dove-house, or the like in the Testator for Years. Secondly, as to *Chattels Personal*, all Debtors taken in Execution, Captives, Apprentices, all Cattle, of all kinds, Creatures naturally Tame, or being otherwise, are by Act reduced thereto, as Hawks reclaimed or the like, also Hounds, Greyhounds, Spannels, Mastiffs, Ferrits, and the like; also all Merchandable Goods and Commodities whatever; Likewise Ships and other Vessels Naval with their Guns, Rigging, Tackle, Apparel;

Apparel, Furniture and Provisions; Likewise Weapons for War, Books, Musical Instruments, and the like; Also Corn, whether in the Ground, Field, or Barn; And Trees Fell'd, or not Fell'd, being Sold from the Inheritance of the Ground, or excepted by the Seller of the Inheritance of the Land; Also all other Grain, as Corn; Also Hops, Saffron, Hemp, and the like, whether on the Ground or in the House; Likewise Hay, and all Fruits gathered, (but not Grass ready to be cut for Hay, nor Fruits on the Trees; but such as are separate from the Inheritance; therefore not Garden-Fruits in the Ground, or not separate from it; Also Bills, Bonds, Mortgages, Statutes, and the like; Also Moucy, Plate, and Jewels; Likewise all Householdstuff, Implements, and Utensils, not fixed to the Freehold; All Coaches, Carts, Waggon, Plows, and the like, with their Appurtenances; Likewise Desks, Cabinets, Trunks, Chests and Boxes, Excepting such as contain only the Evidences of the Inheritance, and have used so to do; Also all Linnen, Bedding, Pewter, Brass, and Iron, that is Moveable, and not fastened to the Freehold as aforesaid: Therefore not such Coppers, Cesterns, or Furnices, nor Locks and Keys, Waynscoot, or Window-glass. Finally, here Note, That Things in Action, as Debts or the like are Deviseable: so are Obligations, and Counterparts of Leases; Likewise Uses not Executed by the Statute of Uses, but remaining at the Common Law. (a) And though Actions altogether uncertain, are not Deviseable; yet possibilities and uncertainties in divers cases are Deviseable. (b)

a] Perk. Sect.
500, Dyer.
b] Perk. Sect.
527, Lit. Broo.
Sect. 437.
Dyer. 272.
Plow. 520.

2. In and by the Question, [Whether a Testator may Bequeath any thing which is anothers, and not his own] is meant and intended any thing wherein neither the Testator, nor the Executor, nor the Legatary hath any just Propriety, or which doth not of Right belong to either of them. Now in order to the Resolution of this Question according to the Civil Law, (discrepant from the Common Law in this point) the known Distinction is, That if the Testator did certainly know the thing Devised to belong unto another, and not unto himself, at the Time when he Devised the same? Then such Devise is good, and the Executor (if there be Assets sufficient) is to purchase the same, and Deliver it to the Devisee. Otherwise it is, in case the Testator were Ignorant thereof, and supposed it to be his own; unless the True Owner consent to the Legacy, or that it was Bequeathed to Pious uses. (c) And in case the Owner thereof will not Sell the same, at least not at any reasonable Rate, the Executor is to pay the Legatary the just value thereof. (d)

c] L. cum alic-
nam. C. de Le-
gar. & Graff. §.
legatum. q. 14,
nu. 2, & Cui ac,
ad Leg. virum
ex familia. §.
si rem tuam.
De Legat.
d] L. non dubi-
um. §. ult. De
Legat. 3.

3. Suppose a Testator doth Bequeath something that is his Executors. In this case the Legatary shall have it, whether the Testator did

did or did not know it to be his. (e) The Law is the same, though there be Co-Executors, and the thing so Bequeathed belong only to one of them. (f) But in that case they shall all bear a proportion, to be allowed them in Assets; but if Assets fail, the Legacy fails also.

e] L. unum ex familia. §. Si rem tuam. de Legat. 2, & Graff. §. legatum. q. 14, nu. 7.
f] Gomez. var. Resol. tom. 1, cap. 12, nu. 14.

4. If a Testator Bequeath to A. B. the same thing which did appertain to A. B. in his own proper Right at the Time when the Testament was made, it is a void Devise; yea, though A. B. should afterwards alienate the Thing, so as that the property thereof were out of him at the Time of the Testators death. (g)

g] §. Sed si rem. Inst. de Legat.

5. Notwithstanding what hath hitherto been said according to the Civil Law, yet by the Common Law the Goods and Chattels that are another Mans are not Deviseable; and therefore if one Man gives or devises another Mans House, it is a void Devise. So also, if one Devise the Things that by special Custom of some Places, (as the Heir-looms do belong to the Heir) this Devise is void, for it is not Deviseable from him. (h)

h] Plow. Grantham's Case. Coe. sup. Lit. 485, & 308.

6. The Law with us is so far from countenancing a Devise of what is another Mans, that it doth not allow the Goods and Chattels which the Testator himself hath joyntly with another to be Deviseable; and therefore if there be Two Joynt-Tenants of Goods and Chattels, (as when such Things are given to Two, or Two do Buy such Things together) and one of them Devise his part of the Things to a Stranger, This Devise is void, Inasmuch that if in this case the Testator make the other Joynt-Tenant his Executor, the Will as to this is void, and he shall not be charged as Executor for these Goods, but he shall have them altogether by Survivorship. (i) Nay, the Goods and Chattels which the Testator hath, but not in his own Right, but in Right of another, are not Deviseable: And therefore an Administrator cannot Devise the Goods and Chattels he hath as Administrator, for such Devise is void. (k) Howbeit; an Executor may appoint an Executor of the Goods of the first Testator, which an Administrator cannot do.

i] Perk. Sect. 526. Littl. 287, Dr. & Stu. 167.

k] Plow. 525. Broo. Adm. 7, Fitz. Adm. 3.

C H A P. VII.

Of Lands Deviseable by Will.

1. *Whether Lands are Deviseable, what Lands, and how much thereof.*
2. *What things may be Bequeathed under a Devise of Lands, and what not.*
3. *What Persons incapable of Devising Lands.*
4. *Who may be Devisees, or what Persons may take by a Devise of Lands, and what not.*
5. *What kind of Testament sufficient for a Devise of Land, and what not.*

a] *Terms of Law. Verb. Gavelkind. & Dyer. fo. 153. verb. Devise.*

b] *Fitz. N. B. ex gravi querela. & Dr. & Stud. l. 1, cap. 7, & 10.*

c] *Little. tit. Burgage.*

d] *Princip. Grounds. fo. 20.*

e] *27, H. 8, cap. 10. It is not Necessary that the Will where- in Burgage*

Land is Devi-

sed should be in Writing. But the Custom of the Place as to the Probat and Enrollment of such Wills ought to be observed. F. N. B. Ex gravi querela. & Broo. tit. Devise 22, 43, 51.

1. **L**ands, Tenements, and Hereditaments held in Gavelkind are Customarily Deviseable by Will. (a) So likewise are Lands held in Burgage-tenure, (b) whereof the Will may be only Nuncupative and without Writing; and into which the Devisee after the Testators death may enter without any Livery of Seyfin thereof made unto him: (c) yet this shall not prevent Survivorship in case of Joynt-Tenancy in such Tenure (d) And though by the Common Law of this Realm, Lands, Tenements, and Hereditaments are not Deviseable, yet now by Statute they are (if held in Socage) all Deviseable, and Two parts of Three though held in Knight-service. (e) But then the Will must be in *Scriptis*, not Nuncupative. Now though Land be thus Deviseable partly by Custom, partly by Statute, yet there are certain persons incapable of Devising Lands, and there are certain Lands incapable of being Devised, as appears by what follows in this Chapter.

2. As Lands are now Deviseable, so there are certain Things in some certain cases that pass by way of Bequest by and under a Devise of Lands: As thus; A Man Seized of Land Deviseable Buildeth a House thereupon, the House is Deviseable; the Law is the same as to a Rent-charge *de novo* created. (f) Also a Man Disseisee of Land Deviseable, Deviseeth to the Disseisor in Fee,

f] *Dyer in Stat.*

of Wills, 32, & 34, H. 8. An

Estate for years might be Devised at the Common Law by him who was Possess'd thereof; but an Estate in Fee might not. Also a Guardian in Knight-Service might Devise the Wardship both of Body and Land. 504 A. 1, Admit. Roll. Abridg. tit. Devise. lit. B.

in Recompence of a Release which the Disseisor made unto him, This is a good Devise. Also where a Man hath Land in Right of his Wife, and he granteth parcel of it to another, and after Devise the Residue to another, This also is good. Likewise where a Man hath a Seigniorie to him descended of the part of his Mother, and after the Tenancy descendeth unto him of the part of his Father, both being Deviseable, and he not having any Issue: In this case he may make Devises to several persons, that is, the Seigniorie to one, and the Tenancy to another. (g) The Lord Dyer also saith, That a Termor of Land which is not Deviseable, erecting a Furnace, and fixing it in the midst of a House in the said Land, may Devise this Furnace. Also that where a Man is Seized of Land Deviseable, and Devise the *totum statum suum* to one and his Heirs, This shall be a good Devise for the Land. Likewise where a Man devise the *primam vesturam seu consuram prati*, which is Deviseable, it is good, and the Law is the same as to Trees growing, and to grow forever. Also Tenant in Fee-simple or in Fee-tail may Devise the Corn, though the Land be not Deviseable, but as to Trees in that case the Law is otherwise. Also a Man Seized of a Mill, may Devise the Runner Stone, but not the under Stone, unless the Mill itself be Devised. Likewise a Man Seized of a Common, granteth a Rent out of the Land, although that the Land be Deviseable, yet that Grant is void, and by consequence a Devise thereof. Nor is an Advowson in gross Deviseable, nor any other Thing which lyeth not in Tenure; but a Mensallty or Seigniorie is Deviseable, because they lye in Tenure. And if the Husband Devise the Corn upon his Wives Land, and dyes, This is good, whether the Corn were Sown before the Marriage or after. (b)

g] Dyer. ibid. cap. 4.

b] Ibid.

3. The persons not qualified to Devise Lands by Will are such as These, viz. A Bishop may not Devise the Land of his Bishoprick; but of the Arrearages of the Rent of the Bishoprick he may make a Devise by Testament. The Law is the same as to a Deane, or Parson of a Church. Also the Master of an Hospital cannot Devise the Lands of the Hospital, nor the Arrearages of Rent issuing out of the same. In a word, Spiritual Persons, Arch-Bishops, Bishops, Deanes, Arch-Deacons, Prebends, Parsons, Vicars, or any Member of a Corporation, may not Devise the Land or Goods which they have in right of their Churches or Corporations. (i) For the Head or any of the Members of a Corporation cannot make a Testament or a Devise of such Lands or goods they have in Common, because they are to go in Succession. Also an Infant of the Age of 16. Years Seized of Lands Deviseable, who may Alien it by the Custom, yet he cannot make a Testament or a Devise thereof; or if an Infant maketh a Will of

i] Per. Sc. 496.

his Land within Age, and dyeth after that he cometh to full Age, making no Revocation, This is not a good Will. (k) And yet although an Infant until he be of the Age of 21. Years can make no Devise of his Lands; (l) Yet it is held that by special Custom in some places where Land is Deviseable by Custom they may Devise it sooner. Also a Woman under Covert cannot make a Devise of her Land with or without her Husbands consent, neither to her Husband nor to any other. (m) Yet of the Goods she hath as Executrix to another she may make an Executor without his consent; but of them she can make no Devise either with or without his consent, because they are not Deviseable; and if she do Devise them the Devise is void. (n) Touching such as are Born both Deaf and Dumb: The Lord Dyer says; They may make a Will of their Land by Signs. (o) Though others Affirm, That a Man that is both Deaf and Dumb, and that is so by Nature, cannot make a Testament; but that a Man that is so only by Accident, may by Writing or Signs; so also may a Man that is only Deaf or Dumb, whether by Nature or Accident. Also an Alien Born and not Denizon'd cannot make a Testament of his Lands; yet if an Alien Purchaseth Land in Fee, and maketh a Will, and after the King maketh him a Denizon, after he dyeth, his Will is then good as to his Lands or Goods. (p) Also a Traytor Attainted, from the Time of the Treason committed can make no Devise either of his Land or Goods; for they are all forfeited to the King; yet a Pardon from the King restores him to a capacity of dying Testate as to both. Likewise a Man Attainted or Convicted of Felony cannot by Testament Devise either Lands or Goods; for they are also forfeited, but if he be only Indicted and die before Attainder, he is then Testable as to both; or being Indicted will not Answer upon his Arraignment, his standing Mute may possibly preserve him a power of Devising his Lands. And although the Testament of a *Felo de se* be void as to his Goods and Chattels, yet as to his Lands it is good. (q) So likewise although a Person Outlawed in a Personal Action cannot, so long as the Outlawry doth continue in force, make a Testament of his Goods and Chattels, yet of his Lands he may; not so of Persons Outlawed for Felony; the Law is the same as to a Man Attainted of a Præmunire; It is otherwise if a Man be only Excommunicated. (r)

4. Regularly all Persons who may be Grantees may be also Devisees. (r) Inasmuch that a Devise of Lands is good within the Statute of Wills, (t) even to such persons as to whom a Legacy by the Civil Law is void, except in certain cases; such as Hereticks, Apostates, Traytors, Felons, Excommunicates, Outlaws, Bastards, unlawful Colledges, Libellers, Sodomites, manifest

k] Dyer. ubi
supra. cap. 1.
§. 7.
l] St. 32. & 34.
H. 8.

m] Stat. ibid. &
Co. 4. 51. &
Broo. tit. Test.
13. & Co. sup.
Lit. 112. 4. 61.
& Broo. Devise
32.

n] Sk. Epir.
verb. Testam.
fo. 933.

o] Dyer. in
Stat. 32. & 34.
H. 8.

p] Dyer. ibid.

q] 5 & 6. Ed. 6.
c. 11. prerog.
Reg. Plowd.
258, 259, &
261.

r] Dyer. in St.
wills.
s] Perk. 505.
510.
t] Dyer. 303.
204. B.R. Cur.
Mich. 3. Jac.

niff & Ufurers, and Recufants Convict. ¶ It is a Rule, That the Devisee must be capable of the thing Devifed at the Time of the Devifors death if it be then to take effect in Poffeffion; or if it be a Remainder, he must be capable of it at the Time when the Remainder shall happen, otherwife the Devife is void; (w) If ^{u]} F.9.Jac.B.R. fo, then a Devife to an Infant in the Womb at the Testators death feems to be void; (w) Yet if a Man Devife to fuch an Infant, and he happen to be Born before the Testators death, it feems that in this cafe the Devife is good. Again, A Devife made to a perfon altogether uncertain, and not certainly Named or Defcribed, is altogether void; yet a plain Defcription of a Perfon (without naming him) is fufficient, fo that a Devife made to the Dean of *Pauls* (without naming him) is good. A Man Devifeth his Land to *Eleanor* the Daughter of I. S. who hath divers Daughters, whereof one is named *Hellen*, and none *Eleanor*; This is a good Devife to *Hellen*. (x) Likewise if a Man hath Two Wives, and he Devifeth his Land to his latter Wife in Fee, the first Wife shall have it; or if he hath Two Sons called *John*, and one of them is a Bastard born before Marriage, and he makes a Devife to his Son *John*, the Legitimate *John* shall have it and not the Bastard. (y) The Husband can be no Devisee as to a Devife of Lands from his Wife. There are Three Brothers by the same Father and Mother, and the middle Brother Seized of Land Devifeable, giveth it by his Testament *Propinquiiori fratri suo*, it seems that neither of them shall have it. (z) Suppose a Man who hath a Term, Devifeth the Land to one and his Heirs, the Devisee dyeth leaving Executors; his Heirs shall have the Land, and not his Executors; the Law is otherwife in cafe the Entire Term were fo Devifed. (a) A Devife of Land made to the Canons of a certain Cathedral for ever, or *Canonicis Ecclesie D. Pauli Lond. in perpetuum*, is a good Devife to all the Canons joyntly in Fee, and the Survivor shall have the Entierty. If a Man willeth that his Executors shall Sell his Land for the Payment of his Debts, and they all die save one, who maketh the Sale; in this cafe the Vendee shall not have the Land; the Law were otherwife if the Land had been Devifed to the Executors to be Sold. If a Man hath Issue a Son, and Land is Devifed to the Father *Habend. sibi & Hered. de Corpore suo Legitime procreand.* and after the Devisee hath Issue another Son, the second shall have the Land. (b) If a Man Devifeth by the Will, That after the death of his Wife the Land Devifeable shall go to I. S. his Wife shall have it for her Life by this Devife. Or if a Man willeth that after 20. Years after the death of the Devifor I. S. shall have the Land in Fee, the

^{w]} *New Terms of Law. tit. Devise. But by the Civil Law it is otherwise. Paul.de Castr. in l. qui filius. §. i. ff. de Legibus.*

^{x]} *Dyer. in. St. 32. H. 8.*

^{y]} *Dyer. ibid.*

^{z]} *Ibid.*

^{a]} *Ibid.*

^{b]} *Ibid.*

[c] Ibid on the
St. of Wills. c.
4. §. 1.

[d] Perk. 476,
477. March.
Rep. f. 206:
Pl. 245.

[e] Dyer. ubi
supra.
[f] Ibid.

Heir. of the Devisor shall have the Land during the Term, and not the Executor. (c) 5, A Testament *Nuncupative* is not good for a Devise of Land, nor a Testament made in Print; if it were never writtens, yet a Testament writtens, though no Executor be named therein, is good for Lands, but not for Goods. Likewise a Testament without Sealing or Subscribing is good enough for a Devise of Land; (d) so as it be put into Writing in the Testators Life Time, although it be never proved before the Ordinary. (e) But if in a Testament there are these words, *viz. Hec est voluntas & intentio mea* A. B. &c. This is not good for the disposition or devise of Land without saying *ultima voluntas*, (f) according to the Lord Dyers Opinion, who in his Learned Readings on the Stat. of Wills, 32. and 38. H. 8. if he were indeed the Auther of that Impression, 1648. doth further Affirm, That if a Man makes a Testament of his Land in one County, and long after makes a Testament of his Land in another County, These are good. Also that if Two Men severally Seized of Lands make a Joynt-Testament of their Land, This shall be good, and several Testaments. Also that where a man is in making his Testament, and having Devised a parcel of his Land, dies before the perfection and finishing thereof, This shall be good for so much as is Devised. That a Man willing by his Testament, that his Lands shall be Sold to pay his Debts, not declaring by whom; This is a good Will, and shall be performed by his Executors for Administrators. That a Man making a Will of Land, in which he hath nothing, and after Purchaseth the same Land, and dyeth, This is not good. That a Woman Covert making a Will of her Land, and after taking a Husband, who hath Issue, the Husband dyeth, the Wife dyeth, this is not a good Will. That if a Man make a Will of his Land, and after alien this Land in Fee, and after repurchaseth the same Land, This is not a good Will. That a Man making a Will, and after making a new Will, and after on his Death-bed saith, That the first Will shall be his last Will, This is good. Also that where a Man giveth Land by his Will in Fee, and after by another Will giveth the same Land to another but for Term of Life; This is a Revocation of the Entire first Will. (g) Also if a Man Devise another Mans Land, This Devise is void; but if he after the Devise made, Purchase this Land, then the Devise is good. (h)

[g] Dyer. on the
Stat. of Wills.
cap. 2.
[h] Plow. 144.
Fuz. Devise. 7.

C H A P VIII.

Certain Cases touching Devises of Land, Void or not.

1. Lands What, and how Devisable.
2. Certain void Devises of Land.
3. To what Persons and in what Cases Devises of Land may be good or not.
4. The same Lands twice Devised to several Persons in the same Will, how both Devises may stand good.
5. The Profits of Land Devised do pass the Land it self, in which Case Testaments more favourably construed then Deeds.
6. How Lands Purchased after a Devise of Lands made, may pass by that Devise or not.
7. Several Cases in Law referring to this Subject.

1. **A**lthough Lands made Devisable by Statute cannot be Devised otherwise then by Will in Writing, yet Lands and Tenements Devisable by Custom may be Devised by a Nuncupative Will without any Writing. But Copy-hold Land is not Devisable; nor can Tenants in Tail or *pur autre vie*, or Joynt-Tenants Devise their Estate in the Land they so hold, no more then they could before the making of the said Statute, which doth not impower them thereunto. But such as are Seized of Land in Common or Coparcenary, may devise the same. (a) And if there be Two Joynt-Tenants for Life, and the Fee-simple to one of them, he that hath the Fee-simple may Devise his Fee-simple after the death of the other Joynt-Tenant for Life. And in such places where Lands were Devisable by Custom before the making of the Stat. of 32. H. 8. a Devise of Lands may be good against the Heir for the whole, but by the Stat. impowering to dispose of Lands by Will, a Devise of Land is not good against the Heir save only for Two parts in Three.

2. He that Deviseeth Land ought to have a Right to, and possession of the Land he Deviseeth, otherwise the Devise is not good; and therefore if a Disseisor Devise the Land he hath gotten by Disseizin, this Devise as to the Disseizee is void. (b) Likewise if a Man be Disseized of his Land, so that he hath nothing but a Right thereof left, and then he Devise this Right or the Land, this Devise is also void. So if one Contract for Land, and pay his Money for the same, but hath no Assurance made

4) St. 32. H. 8. c. 1.
1. & St. 34. H. 8. c. 5. & Coke sup. Lit. III. Perk. Sect. 544. Lit. Sect. 287. Dyer. 210. Old N. B. 89 Perk. Sect. 500. 539. 540. 446. 497. 498.

A man seized of Land Deviseable, Deviseeth totum statum suum to one and his Heirs; this is good for the Land. Dyers Read. on Stat. of Wills. Sect. 4. §. 6. 2) Plow. 485.

hitho

him of the Land, and he Devise the same to another, such Devise cannot be good; yet possibly he that received the Money may be compellable in a Court of Equity to Assure and Settle the Land according to the Devise. (c) Likewise if one Devise another Mans Land, such Devise is void; but if after such Devise made he Purchase this Land, and die without Revocation, now is that Devise good. (d) Also if A. Bargain and Sell Land to B. on Condition of Re-entry if he pay to B. Twenty Pounds; and B. Covenants that he will not take the Profits until default of Payment; and A. make a Lease of Seven Years thereof to another, and after break the Condition; in this case B. may Devise the Land, and the Devise will be good. (e)

1) *Adjudged.*
Powfley and
Blakemans
Case,

A man Devise
seth his Land
to Elianor, the
Daughter of I.
S. and he hath
divers Daugh-
ters, whereof
one is named
Hellen, and
none Elianor,
This is a good
Devise to Hel-
len. Vid. Dyer's
Read. Stat. on
Wills. Sect. 3.
§. 15.

f) Pasch. 9. Jac.
Newmans Case.

g) Co. sup. Lit.
386.

h) Plow. 523.
540. & Dyer
357. & Co. 8.
24. 83.

3. If one Devise his Land to the Children of A. B. by this Devise the Children that A. B. hath at the Time of the Devise made, or at most at the Time of the Testators death, and not such as shall be Born after his death, shall take by that Devise and have the Land. Also, if a Devise of Lands or Goods be made to the Heirs of A. B. (he then, and at the Time of the Testators death being alive) this Devise is void; because the person to whom a Devise is made must be capable of the Devise by that Name by which the Devise is made to him, when there is no other description whereby to infer the Testators meaning; yet if Lands or Goods be Devised to the Executors of A. B. and he die before the Testator, and make Executors, This is a good Devise to such Executors; or if a Man make a Feoffment of his Land to the use of his last Will, and then Devise that his Feoffees shall be Seized to the use of B. C. This is a good Devise of the Land *per intentionem*. (f) Also a Devise of Land to one, paying so much a Year to another, with a Clause of Distress upon failure of Payment, is a good Devise; but a Warranty cannot be made by a Will. (g) Yet if Land be Devised for Life, or in Tail, Reserving a Rent, in this case the Devisors Heirs shall be bound to the Warranty in Law, and the Devisee shall take advantage thereof. Also a Devise of Land may be made to one, and a Devise of a Rent out of the same Land to another in the same Will, and both stand good. Likewise Land may be Devised to one in Fee, and after the same Land in the same Will may be Devised to another for Life or for Years, and both these Devises may be good, and may well consist together. (b)

4. In like manner if a Man in the former part of his Will Devise all his Lands by general words to one in Fee, and in the latter part of his Will Devise some special part thereof unto another in Fee; Both these Devises are good, and may stand together; that is, The former Devise is good for as much as is not afterwards more specially Devised, notwithstanding the

Subse-

Subsequent Specification; and the latter is good for so much as is so specially Devised, notwithstanding the precedent general Disposition. It is otherwise when the general Clause comes last, for then the first Devise is void. (i) So also it is supposed to be where both the Devises are particular, that then the first Devise is void: As suppose a Man doth first in his Will Devise Long-acre to A. and his Heirs, afterwards in the same Will he doth Devise the same Land to B. and his Heirs, in this case some have held the first Devise to A. is void, which others have denied, holding that both the Devises are good, and that A. and B. in this case shall be Joynt-Tenants. (k)

5. If a Man Devise the Use, Profits, or Occupation of his Land, by this Devise the Land it self is Devised. (l) Or if a Man Devise only the Profits of his Land, this is a Devise of the Land it self. (m) For Lands will pass by words in a Will, which will not pass by the same words in a Deed; but whatsoever will pass by any Words in a Deed, will pass by the same Words in a Will. The Reason is, because Wills are always more favourably interpreted than Deeds; and there is good Reason for that also. If a Man says in his Will, I give all my Land or all my Tenements to A. B. he shall have not only all the Lands; whereof the Devisor is Sole Seized, but also all the Lands whereof he is Seized in Common, or Co-parcenary with another, and not only all the Lands he hath in possession, but also the Lands he hath in Reversion of any Estate he hath in Fee-simple. But if he say, I give all my Lands in Possession only, then the Lands he hath in Reversion are excluded out of that Devise. (n)

6. If a Man Seized of Land of Fee-simple in the Parish of Grade, saith in his Will, I give all my Lands in the said Parish to A. B. and after the Will made and published he doth Purchase other Lands in the said Parish and dyeth; in this case, and by this Devise A. B. shall not have the new Purchased Lands. (o) Yet by a new Publication of the Will after the Purchasing of such Lands they will pass to A. B. the Devisee. (p) Yea though he hath no Land in the said Parish at the Time of making the said Devise, yet if afterwards he doth Purchase Lands in that Parish, in this case such new Purchased Lands will pass by the said Devise; because it shall in that case be intended that he meant to Purchase them. Also if a Man hath some Lands in Fee-simple, and other Lands only for Years in Dale, and he Devise all his Lands and Tenements in Dale; by this Devise the Lands and Tenements he hath for Years doth not pass; but if he hath no other Lands in Dale but those for Years, in this case probably they will pass. (q)

7] 38. Eliz. Co. Banc.

4] Queze.
Dyer in his
Lett. 1. & per
Inst. Dodr.
7] Co. 8. 94.
Plow. 525.
8] Brownl. 80.
1. Part.

7] Plowd. 66.

7] Plow. 343.
344. Old N. B.
89. Fitz. De-
vise 17.
8] Trin. 37.
Eliz. B. R.
Breckford.
vers. Parineote

9] Hill. 20. Jac.
B. R. Loftis
vers. Baker.

7. A. Deviseeth his Lands to M. his Wife, until E. his Daughter shall accomplish the Age of 21. Years, the Reversion to the said E. and the Heirs of her Body, upon Condition that she shall pay unto his said Wife during her Life, in Recompence of her Dower of all his Lands 20 l. and upon default of Payment he wills his Wife shall enter, and enjoy all the Lands during her life; the Remainder *in supra*, the Remainder to I. S. in Tail, and dies. M. the Wife enters, E. the Daughter being within the Age of 14. Years. M. takes to Husband I. D. The Husband and Wife came and demanded the 20 l. and none ready to pay it, Whereupon the Husband and Wife brought a Writ of Devise and Recovered. In this Case it was Resolved, were the 20 l. Rent or a Sum in gross, That by the bringing of the Writ of Dower. the Wife of the Devisor had lost all the benefit which was to come to her by the Devise; because the said Rent was Devised to her in Recompence of her Dower; so that it was not the meaning of the Devisor that the Wife should have both. (r)

r) Mich. 30. El.
in C.B. Gesslin
& Werburtons
Case Leon.
Rep. p. 137;
138.
s) 5. P. & M. vid.
Owen 30. &
Hugh. Abridg.

(s) In the Time of Queen Mary, Benloes Serjeant moved this Case: A Man Seized of Lands and Tenements in London devised them by these Words, *viz.* [I Will and bequeath unto my Wife A. my livelihood in London for Term of her Life] and that by this Will the Lands in London pass to the Wife by this Word [Livelihood] Note, for Brook Justice said, That it was in ancient Time used so in divers places of this Realm; and had been taken for an Inheritance. Unto which Dyer also agreed.

A. having Two Sons by Two Wives, devised his Land to I. his Eldest Son, and his Heirs, after the death of his Wife, to whom he devised them for her Life. The Question was, Whether the Son should take them by Devise as a Purchaser, or as Heir at Common Law by descent. The Court held, that the Devise was void, and that it was not in the power of the Son to make Election to take by descent, or by Purchase; but he must of necessity take the Land as the Law directs, which is by descent; And it is against a Maxime of Law to give a Thing to such a person to whom the Law gives it, if it had not been given. (t)

t) Mich. 24.
Car. in B. R.
rot 2052.
Preston and
Holmes's Case.
Styles 148,
149.
u) Trin. 1649.
rot. 849. in B.
R. Beal and
Wyman's Case.
Styles 240.

A Man made his Will in these Words, *viz.* I give and Bequeath one half of my Lands to my Wife, and after her death I give all my Lands to the Heirs Males of any of my Sons, or next of Kin. In this Case it was held, That the Devise was void, because of uncertainty, and the words being in the disjunctive; and we ought not to frame a Sense upon the Words of a Will, where we cannot find out the Testators meaning. (u) Likewise it hath been adjudged, That Lands devised to

a Maus

a. Mans Issue was uncertain, and therefore such Devise void. (x)

x) 42. Eliz. in
C. B. Taylor
and Sanyers
Case.

If a Man hath in his Occupation several Farms together, and then doth Devise one of the Farms called D. and all the Lands to the same belonging, the other Farms shall not pass with it, although they be occupied altogether. (y)

y) Trin. 20. Jac.
in B. R. rot.
811. Knights
Case. Godbolt.
358.

If a Man doth Will and Devise, That A. and B. his Feoffees shall stand Seised, and be Seised to the use of I. S. for his Life, the Remainder over, &c. when in Truth he hath no Feoffees. It is a good Devise to I. S. by reason of the Intention. Or if a Man make a Feoffment to his own use, and afterwards Devise, That his Feoffees shall be Seised to the use of his Daughter A. who in Truth is a Bastard, it is a good Devise of the Lands by Intention. (z)

z) Mich. 2. Car.
in B. R. Bassfield
and Eyboro's
Case. Popham
188.

Three Brothers are of one Father and Mother the middle Brother Seised of Land Devisable, giveth this by his Testament *Propinquiri fratri suo*. It seemeth that none of them shall have it. (a)

a) Dyer's Read.
on the Stat. of
Wills. Sect. 3. 5.
5.

Note, it was held by the Justices, That if a Man Seised in Fee of a Mannor and Lands, Devise the same by his Will to his Son, and afterwards in another part of the same Will devise the a Third part of the same Lands to another of his Sons, That they are Joynt-Tenants of the Lands: And so if a Man in one part of his Will devise the same Lands to A. in Fee, and afterwards by another Clause in the same Will he devise the same Lands to another in Fee, they are Joynt-Tenants. (b)

b) Mich. 8. Eli.
in C. B. Leon. 3.
Part. 11. &
Hughe's Abr.
3. Vol. in Ap-
pen. tit. Wills,
Testaments
and Devises.

(c) Between B. and P. the Case was this. I. W. being Seised of the Mannors of W. and C. in Socage, made his Testament, devised the Two Mannors in Form following, viz. The Mannor of W. to the Eldest Son of R. F. his Cousin, and his Heirs; and further he devised the other Mannor to M. W. during her life, and if she dies, and then any of my Cousin F's Sons Living, then I will my said Mannor of C. to him that shall have my Mannor of W. — R. F. had Two Sons G. and I. — G. enters on the Mannor of W. and the said M. enters on the other Mannor. After G. dies without Issue. I. enters on the Mannor of W. and alienates the Fee thereof Afterwards M. dies. I living. The Question was, Whether I. ought to have the M. of C. or not. The Court agreed, That he could not have it, for that he was not such Person as was named or limited to take by the Will, for that he had not the Mannor of W. at the Time of the decease of M. and therefore not the Person intended by the Will.

c) Trin. 35.
Eliz. Browne
and Pease Case.
Anderl. Rep.
Case 315.

d) Trin. 37. El.
Beckford vers.
Parnecott. Cro.
par. 3.

(d) The Case was, That R. P. Seised of divers Lands in A. and having Issue Four Daughters, B. I. F. M. made his Will 27. Eliz. in Writing, and thereby all his Land in A. he devised to B. and I. his Daughters, and made them his Executrices, and after in 33. Eliz. Purchased other Lands in A. (which are the Lands in Question) and after one I. S. came to the Devisor, and desired that he would Sell unto him those Lands which he lately Purchased. And he said; *No, they shall go with my other Lands in A. to my Executrices.* Afterwards in 34. Eliz. he fell Sick, the Will was read unto him, and he said nothing thereto; but then gave divers Legacies of Goods to others, and caused them to be written and annexed in a Codicil thereto, and dyed, Whether these Lands newly Purchased shall pass to the Executrices by that Will, was the Question? viz. Whether by those words used to a Stranger, or the annexing of a Codicil to the Will, being only concerning Goods, be as a new Publication of his Will, to make these Lands to pass, &c. First, It was agreed by the Council on both sides, and by the Justices, That if the Devisor after the Purchase of that Land had made new Publication of his Will, and shewed his Intent, that those Lands should pass, it had been a good Devise of them: For the Words in the Will are [all his Lands in A.] which are apt enough and sufficient to carry them, and he could not have added more apt words thereto. But afterwards all the Justices (*Gandy absente*) held that it is a new Publication of his Will, and sufficient by the words to I. S. For that shews his intent sufficiently, and the Will writ hath words sufficient. And *Fenner* held, That the annexing of the Codicil thereto, is a new Publication as to it: For therein he Affirmed, That it should be his Will at that Time. But the other Justices doubted thereof, because he doth not shew thereby any intent, That this Will should be for his Purchased Lands, nor that he then remembered them. But for the foresaid Reasons it was adjudged for the Plaintiff, That those Lands well passed by the Will.

i) Mich. 34. El.
In the Court of
wards. The
Lord Cheneys
Case. Co. 5 part
67.

(e) Suppose a Man hath Two Sons, both named *John*, and conceiving his Eldest Son to be dead, he Deviseeth his Land by his Will to his Son *John* generally, when in Truth the Eldest Son is living. In this Case the Younger Son may alleadge and give in Evidence the Devise to him, and may produce Witnesses to prove the Intent of his Father; And if no Proof can be made, the Devise shall be void for the uncertainty of it.

f) Mich. 48. &
39. Eliz. C.B.
Bon. vers.
Smith. Cro.
par. 3. pl. 64.

Glauville Serjeant prayed the Opinion of the Court in this Case. (f) A Man had Issue a Son and a Daughter, and Devised his Lands to his Son in Tail, and if he dyed without Issue, That

That it should remain to the next of his Name, and dyed. The Son dyed without Issue, the Daughter being then Married, whether she should have the Land was the Question? And held *per Curiam*, That she should not: For she had lost her Name by her Marriage; but it should go to the next Heir-male of the Name. But if she had not been Married at the Time of her Brothers death, the Daughter should have had it, for she was the next of the Name.

(g) One Devised certain Lands in N. in Tail, the Remainder to the next of the Kin of his Name, and at the Time of the Devise, the next of his Kin was his Brothers Daughter, who was then Married to I. S. the Devisor dyed. The Tenant in Tail dyed afterwards without Issue. Whether the Daughter should have the Land was the Question upon a special Verdict, and adjudged without Argument that she should not: For she is not now of the Name of the Devisor; but of her Husbonds Name. But if she had been unmarried at the Time of the Devise and death of the Donor, although she had been Married at the Time of the death of the Tenant in Tail without Issue, yet she should have had the Land. Wherefore it was adjudged accordingly.

67 Trin. 39.
Eliz. C. B.
Jobsons Case.
Cro. par. 3.

(h) *Ejectione Firme*; For certain Lands in A. upon Evidence to a Jury, a Devise was shewn of an House with the Appurtenances, and thereby Land in the Field was claimed. And *Popham* doubted whether it should pass. But *Fenner* said, That it well might pass. And that upon *Demurrer* in 28. *Eliz.* it was adjudged accordingly. The Defendant then to make it clear shewed, That the House was Copyhold, and the Land Freehold: And the whole Court thereupon conceived, That it could not be said Appurtenant, although it had been used with it. Wherefore the Plaintiff was Non-suited.

67 Mich. 41.
Eliz. B. R.
Yates vers.
Clinkard Cro.
par. 3.

(i) In the Case between H. and H. all agreed the Case of 13. H. 7. That a Testators Devise to his Heir of his Land after the death of his *Feme*, is a good Devise (by Implication to the *Feme*) of that Land during her life; for it appears he intended his Heir should not have it until the death of his *Feme*: And none other can have it besides the *Feme*. And therefore it is a good Devise to the *Feme* by Implication. But if such a Devise had been to a Stranger, after the death of his *Feme*; it might peradventure have been otherwise; for the Heir in the Interim might have had it.

17 Trin. 2. Jac.
Horton vers.
Horton. B. R.
Cro. par. 2. pl. 4

(k) Note, That the Opinion of all the Justices was, That if one make his Testament, wherein are these words, viz. [*I Re-lease all my Lands, &c. to A. and to his Heirs.*] It is a good Devise of the said Lands to A. and his Heirs.

67 Mich. 37. H.
8. *Anders.* Case.
83.

1] Mich. 30.
31. C.B. *Anders.*
Case. 117. vid.
dict. Case.

(l) Upon a special Verdict the Case was this. A Woman Seised of Lands made her Will, and devised the same to one and his Heirs; after they Intermarry. After Marriage the Woman intending to revoke her Will, doth revoke it by words after Marriage, and saith, That her Husband shall not have the Land by her Will, and after dyes. Whether the Husband by that Will, or the next Heir to his Wife, shall have the Land, was the Question? The Case was Argued *Pro & Con*, several Arguments on both sides. In fine it was Adjudged, That the Will was void, and that the Husband could take nothing thereby.

m] Pasc. 5. El.
Moo. Rep. nu.
143.

(m) A Man Devised his Lands to his Wife from Year to Year until his Son I. come to the Age of 20. Years, and dies; the Wife enters. I. dies before he attain the Age of 20. Years. And it was moved by *Harper*, whether her Interest were thereby determined. And it was held by all the Justices, That by the death of the Son the Estate of the Wife was determined, and that she had no longer any Estate therein. For it is to be intended that the Will of the Devisor was, That his Wife should have the Land during the Minority of his Son, for that he himself could not Legally dispose of the Land, being within Age. And *Dyer* said, That by these words *de anno in annum*. It is intended, that the Will of the Devisor was, That the Interest of the Wife should determine by the death of his Son. But if the Words had been [until his Son should Come, or might Come to that Age of 20. Years] then notwithstanding his death, the Estate of the Wife had continued.

n] Mich. 30. El.
in C.B. Sir *Ant.*
Denny's Case.
Leon. 2. Part.
190. & *Hugh's*
Abridg. Ap-
pen. tit. Devise.

(n) A. Seised of the Mannor of *Cheffam*, extending into *Cheffam*, and the Town of *Hertford*, and also of Lands in *Hertford*, Devised by Will the Mannor of *Cheffam* to B. his Eldest Son in Tail, and the Lands in *Hertford* to C. his Younger Son. It was held by all the Justices, That the Younger Son should have all that part of the Mannor of *Cheffam*, which lay in the Town of *Hertford*.

o] Pasc. 16. El.
in B.R. Leon.
2. Part. 221. &
Hugh's Abridg.
ibid.

(o) A. Devised that his Lands should descend to his Son, but Willed, That his Wife should take the Profits thereof, until the full Age of the Son, for his Education and bringing up, and dyed; The Wife Married another Husband, and dyed before the full Age of the Son. It was the Opinion of the Justices, in this Case, That the second Husband should not have the Profits of those Lands till the full Age of the Son; For nothing is Devised to the Wife but a Confidence, and she is a Guardian or Bailiff for to help the Infant, which by her death is determined, and the same Confidence cannot be transferred to the Husband.

A Man Seised of a Messuage to which a Garden and a Curtilage did belong, Enclosed with a Wall, and there was no way to the Garden but through the Messuage: He Devised the Messuage to his second Son in Fee, not mentioning the Garden nor Curtilage, nor saith *cum pertinentiis*: (p) It was Adjudged in this Case, That the Garden and Curtilage did pass by this Devise; *They said a Curtilage is parcel of the House, as a Stable and a Dovehouse; and the Garden shall pass, because it is as well for Necessity to it as for Pleasure.

p) Hill. 30. El.
B.R. Garden &
Tuckcase, 110.
3. Part. 89. &
Hughe's ibid.

A. Seised of Lands had Two Daughters, and Devised the Lands to the Eldest and her Heirs, that she pay to her Younger Sister yearly 30 l. It was the Opinion of all the Justices, That this was a Condition, for so was the Intent of the Devisor; For otherwise the Younger Sister had no Remedy for the Rent. (q) And in this Case it was Adjudged, That the Younger Sister might enter upon a Moity of the Land, for breach of the Condition in Non-payment of the Rent, for which the Action was brought.

q) Trin. 30. El.
B.R. Crickmore
& Patersons
Case. Cro. 3.
Part. 146.
& Hughe's ibid.
r) Mich. 30. El.
B.R. Bon &
Smith's Case.
Cro. 3 Part.
532. vid. Trin.
39. Eliz. c. B.
Jobsons Case.
Cro. 3 Part.
576. Adjudged
acc.

(r) A Man had Issue a Son and a Daughter, and he Devised his Lands to his Son in Tail; and if he dyed without Issue, it should remain to the next of his Name. (r) The Son dyed without Issue, the Daughter being then Married. The Question was, whether she should have the Lands? It was Resolved by the whole Court, That she should not, for that she had lost her Name by her Marriage: But if she had not been Married at the Time of her Brothers death, she should have had it, for she was the next of Name.

A. B. Seised of Lands in Socage, Devised the same by Words to his Three Sisters; a Stranger present Recited the Testators words to him; whereat he Affirmed the same. Afterwards the Stranger for his own Remembrance puts the words into Writing, but read them not to the Devisor before his death. This Devise so Reduced into Writing *mode & forme* is void, because it was written without the order or direction of the Devisor, and consequently not within the Statute. But if after the writing thereof he had read the same to the Devisor, and thereupon the Devisor had Affirmed the same, it had then been a good Devise. (s) It was the Opinion of, &c.

s) Pas. 30. El.
B.R. Naib &
Edwards Case.
Leon. 113.

It was the Opinion of the whole Court that the Devise was void, and Wray Chief Justice said, That if he Appoint A. to write his Will, and it is written by B. the Devise is void. But if after he has written the Will, he had Read it to the Devisor, and he confirmed it, it had been a good Will. It was the Opinion of the Court, That the Plaintiff being Heir at Law, should have Judgment to Recover the Lands against the Three Sisters.

f) Trin. 30. El. Rot. 1160. Whisker & Cleyns case. Leon. Rcp. p. 156.
 A. devised his Lands to W. after the decease of his Wife, and if he fail, then he willeth all his part to the discretion of his Father, and dyed. W. Survived, the Father being dead before, without any disposition of the Land. In this Case the Father hath a Fee-simple, there being no difference where the Devise is, That I. S. shall do with the Land at his Pleasure, and the Devise thereof to I. S. to do with it at his discretion. (t)

n) Hill. 43. Eli. B. R. Beckford & Parnacles case. Goldesb. 150. vid. Bret. & Rigden case. Flow. com. 340
 A Man Seised of Lands in A. hath Issue four Daughters, A. B. C. D. and devised all his Lands in A. to A. and B. Two of his Daughters, and made them his Executrices: Afterwards he Purchased other Lands in A. A Stranger being desirous to Buy this Land of him newly Purchased, he refused, saying, That this Land should go with the Residue of his Land to his Executors, as his other Lands should go. Afterwards the Testator made a Codicil, and caused it to be annexed to his Will; but in the Codicil no mention was made of this new Purchased Land. In this Case this new Purchased Land shall not pass: For Notwithstanding that the Reading of the Will, and the making of a Codicil, may amount to a new Publication; yet it doth not manifest the Intent of the Devisor to be, that more shall pass by that, then he intended at the first; Also the new Reading of the Will, and the annexing of a Codicil, may not properly be termed a new Publication; And without an express Publication for this Land newly Purchased, this Land shall not pass. (u)

w) Mich. 43. Eliz. in C. B. Rot. 124. Korry & Birricks case. Cro. 2. Part. 104. Hughes Abridg. tit. Devise.
 A Man Let several Houses and Lands by several Leases for Years, rendring several Rents, amounting to 10 l. per annum, and made his Will in this manner; viz. I Bequeath the Rents of D. to my Wife for Life; the Remainder over in Tail. By this Devise the Land it self shall pass; for it appears, his Intent was to make a Devise of all his Lands and Tenements, and that he intended to pass such an Estate, as should have continuance for a longer time then the Leases should endure; and the words are apt enough to convey the Lands, it being an usual manner of speaking of some Men, who name their Lands by their Rents. (w)

A Man Devised Lands to another Man and his Heirs: The Devisee dyed in the Life of the Devisor, and then the Devisor dyed. In this Case the Heirs shall not take by the Devise, for that the Heirs are not named as words of

of Purchase, but only to express and limit the Estate which the Devisee should have; for without these words (Heirs) the Devisee could not have the Fee-simple: and the Heirs are named only to Convey the Lands in Fee-simple, and not to make any other to be Purchaser but the Devisee. (*)

*) Vid. Plowd
com. 342. in a
Bret & Rigden
Case.

CHAP.

C H A P. IX.

Certain Cases touching Devises of Land in Fee-simple.

1. A Fee-simple may pass by several Words and Expressions in a Will, which will not pass it by Deed.
2. A Power to Sell Land Devise'd, passeth the Fee-simple; so doth the Devise of the Land (without other words) on the least Consideration of a Payment to be made by the Devisee.
3. A Fee-simple will pass in a Will as well by the Implication as Expression of the Word [Heirs.]
4. A nice Distinction between Joynt-Tenancy, and Tenancy in Common.
5. A Devise of Lands to a Corporation for Life is a Fee-simple; and whether it may pass by the Word [Assigns] without the Word [Heirs] or the Words [For ever.]
6. A Fee-simple passeth in a Will by Implication of a power to Sell the Lands, as well as by Payment of Money, enjoy'd the Devisee.
7. In what Sense the Habendum shall be Construed, where the Devise of Lands seems somewhat doubtful.
8. In what Case a Fee-simple, and all the Testators Inheritances may pass by General Words to the Devisee.
9. A Devise in Fee made to one, cannot in the same Will be made to another.
10. How the Word [Paying] doth Create a Fee in a Devise, and how by a Devise of Rents the Land it self doth pass.
11. A Devise shall be for the Devisees Benefit, not Prejudice; also in what other Case a Fee shall pass by Implication.
12. In what Case, and by what Words the Fee, and not Leases, or the Leases and not Fee, do pass by a Devise.
13. Other Cases in Law touching this Subject.

1. **T**Here are many Words and Expressions whereby Lands will pass in Fee-simple by a Will, which by a Deed will not so Convey the same. As suppose a Man devise his Land in this manner, viz. I give my Land in Dale to A. B. and his Heirs, or to A. B. in Fee, or to A. B. for ever, or to A. B. Habendum sibi & suis, or to A. B. and his Assigns forever, or to A. B. to give away, or Sell, or do therewith at his Pleasure; All these and such like in a Will Create a Fee-simple Estate, and A. B. shall have

have the Land to him and his Heirs forever; (a) yet by such words in a Deed no more will pass than an Estate for Life, save only in the first Case. Also if any now since the making of the Statute of Uses, Devise that the Feoffees of his Land shall be Seized of the Land to the Use of B. C. and his Heirs, or to the Use of B. C. and the Heirs of his Body; or that his Feoffees shall make an Estate of the Land to B. C. and his Heirs, or to him and the Heirs of his Body; This is a good Devise of the Land in Fee-simple or Fee-tail. There are also several other ways of Fee-simple by Will. For suppose Land be given to a Man *Habend. sibi & Heredis suis*: This indeed is not Fee-simple; other-

wise it is, if it be given *sibi & duobus Heredibus suis tantum*. (b) So if Land be given to a Man *Habend. sibi & Hered.* with warranty of the Land *sibi & Heredibus suis*, This is a good Fee-simple. (c) Or if a Man Devise Land to A. B. for his Life, and after to the Heirs, or to the right Heirs of A. B. By these Devises A. B. hath a Fee-simple in the Land, (d) Also if one Devise his Land to his Wife to dispose thereof at her will and pleasure, and to give it to one of her Sons; by this Devise she hath a Fee-simple; but it is qualified, for she must Convey it to one of her Children, and cannot Convey it to another. (e)

2. When in a Will power is given to a Devisee of Land by the Testator to Sell that Land, such Devisee hath a Fee-simple in that Land, for power to Sell giveth by Implication an Estate in Fee-simple, (f) Also, if one Devise his Land to A. B. paying 10 l. (without other words.) By this the Devisee hath the Fee-simple of the Land, albeit the 10 l. be not the Hundredth part-value of the Land? In like manner, If one Devise Land (whereof he is Seized in Fee) to A. B. paying 10 l. to G. D. By this Devise, albeit there be no Estate expressed, yet A. B. hath the Fee-simple of the Land in respect of the Payment of the Money. (g) This holds True only in case the Intent of the Testator doth not appear to be otherwise.

3. If one in his will devise his Land to his Wife in the first place, and then saith my Will is, That my Son A. shall have it after my Wives death, and if my Wife dye before my Son B. that then my Son A. shall pay to B. 10 l. by the Year during the Life of B. and also 100 l. to L. S. In this Case A. shall have the Fee-simple of the Land. (h) Also, if one Devise his Land in this manner, viz. (i) I give White-acre to my Eldest Son and his Heirs for his part; Item,

equally divided between them, they are Tenants in Common. But if I Devise Lands to Two, equally to be divided between them by L. S. Till such Division be made they are Joint-Tenants. Mich. 31. Eliz. in B. R. *Dickens & Marples Case* Goldesbr. 182, 183.

(*Black-acre* to my youngest Son for his part; by this Devise the Youngest Son shall have the Fee-simple of *Black-acre*: Or thus; I give *White-acre* to A. B. *Item*, *Black-acre* to A. B. and his Heirs; by this Devise A. B. shall have the Fee-simple as well of *White-acre* as of *Black-acre*.

4. If a Man Devise his Land in this manner; *Item*, I give to A. B. and C. D. and their Heirs my Land in *Kent* equally; or my Land in *Kent* equally to be divided; by these words A. B. and C. D. shall have and hold the Land not as Joynt-Tenants, but as Tenants in Common, so that the Heir and not the Survivor shall have his part that first dyeth: And yet in case of such a Limitation by Deed it is otherwise. But if one Devise his Land to A. B. and C. D. and their Heirs (without more words) it seems that by this

Devise they shall take and hold as Joynt-Tenants; (*k*) Yet if one Devise Land to A. B. and C. D. and the Heirs of either of their Bodies lawfully begotten; it seems that by this Devise A. B. and C. D. shall take and hold as Tenants in Common, and not as Joynt-Tenants. (*l*) Likewise the Case is the same, if one Devise his Land to A. B. and C. D. in this manner, *viz.* I Will that

A. B. and C. D. shall have my Lands in *Kent*, and occupy them indifferently to them and their Heirs. (*m*) But if one, who hath Two Daughters only, give or Devise his Land to them in Fee; by this Devise they shall take as Joynt-Tenants, and not be in by Descent as Partners; (*n*) for the Testators Will shall take place.

5. If Land be given to the Mayor and Commonalty of *London*, or any other Corporation to have and to hold for Term of their Lives, it is a Fee-simple. (*o*) Or if a Man say, I give to A. B. my House with all the Lands for 21. Years; and that A. B. shall have all my Inheritance, provided it be not contrary to Law; In this Case A. B. shall have the Fee. (*p*) Or if he give it to his right Heirs Males, and Issue of his Issue of his Name, this also is a Fee-simple. (*q*) And although it be affirmed by some, That if the Testator Devise his Land to A. B. and his Assigns, without saying [For ever,] A. B. shall have an Estate only for Life; (*r*) Yet the contrary is Asserted by others, and that it is a Fee-simple. (*s*)

6. If a Testator saith, I will my Land to my Son A. during his Life, and after his decease to my Son B. And in case my Son A. shall hereafter Purchase Lands of as good Value as that Land for my Son B. that then my Son A. shall Sell the Land Devised to my Son B. as his own, and shall pay 20 l. to C. D. In this Case A. hath a Fee-simple, implied by the Power which A. hath to Sell, beside the Payment of Money. (*t*) Also, if one Devise Land to me and my Heirs, and in Case the Heir at Law put me

out

(*k*) *Adm. 1002*

Lewis vers.

Cox. Mich. 37.

38. El. Com. B.

Dyer. 25. Lit.

Broo. Sect.

133. Lit. 283.

Perk. Sect. 170.

Dyer. 350.

(*l*) *Dyer. 326.*

(*m*) *Falch. 9. Jac.*

Newman's Case.

Brown. Rep. 1.

part. 131. 169.

(*n*) *Goldsb.*

141. Plow. 53.

(*o*) *Dyer. Le-*

ture in Stat.

of Wills. Sect.

5. 5. 13.

(*p*) *Hob. Rep. 7.*

(*q*) *Brown. 129.*

147. 149. 1.

part. & part. 2.

272. 177.

(*r*) *Co. sup. Lit.*

9. Perk. Sect. 57.

239. New Trms

of Law. tit.

Devise.

(*s*) *Trin. 2. Car.*

in B. R.

(*t*) *Mich. 18. Jac.*

B. R. Green

vers. Dewl.

out; that then I shall have other Land instead thereof, in this Case, and by this Devise I have the Fee-simple of the first Land, notwithstanding the latter words. (u) *Likewise*, if a Testator Devise Land to me for my life, the Remainder to his own Son, and the Heirs Males of his Body, and in default of such Issue, the Remainder to the next Heir-male of the Testator, and the Heirs-males of his Body; In this Case the next Heir-male of the Son hath an Estate in Fee-simple. (w)

7. Suppose a Man Seised of Lands, make his Will in this manner, viz. *Imp.* I Devise to my Wife *Black-acre* for her life, the Remainder to my Son T. in Tail. *Item*, I Will to my Son T. all my Lands in D. also all my Lands in S. also my Lands in V. Also I give to the said T. my Son all my Island or Land enclosed with Water which I Purchased of I. S. *To have and to hold* all the said last before Devised Premises to the said T. my Son, and the Heir of his Body. In this Case the *Habendum* shall extend to all the Lands in D. S. and V. and shall not limit the Devise only to the Island; because the thing last Devised by the Will was an Island in the Singular Number, which cannot Answer to the *Habendum* in the Plural, which is extensive to the Island only, T. then should have but for Life in the Lands of D. S. and V. But it was otherwise Resolved, viz. That the *Habendum* should extend to all the Lands in D. S. and V. (x)

8. A Man Seised of a Messuage holden in Socage in Fee, Devised the same by these words: I Devise my Messuage where I dwell to A. B. and her Assigns for 10. Years; and A. B. shall have all my Inheritances if the Law will. In this Case the Devise in Fee of the Messuage is good; and by the general words of the Will, all his Inheritances do also pass. (y)

9. If a Man Devise Lands to one for ever, there he hath a Fee; for such an Estate might be conveyed by Act Executed; But if he further Devise, That if the Devisee do such an Act, that then another shall have the Land to him and his Heirs, the same is void, for when as he hath disposed of the Estate in Fee to one, he hath not power after in the same Will to dispose the same to another, it being a Rule in Law, That such an Estate which cannot by the Rules of the Common Law be conveyed by Grant Executed in his life time by Advice of Council learned in the Law, such an Estate cannot be Devised by the Will of a Man, who is presumed to be void of Council. (z)

10. A Man having Lands in Fee-simple, and goods to the Value of 5 l. only, Devised to his Wife all his Estate, paying his Debts and Legacies; his Debts and Legacies amounting to 40 l. It was Adjudged in this Case, That all his Lands did pass by the Devise, and that the Devisee had a Fee-simple in the Lands, the

Perk. Sect.
367.

x) Trin. 28. El.
in C.B. rot.
1458. Wiseman
& Wiseman
Case. Leon.
Rep. 37. 38.
y) Mich. 11.
Jac. in C. B.
Mylack &
Marking Case.
Godbolt. 208.

z) Co. 1. part.
85. in Corbets
Case.

a) Trin. 1651. word: [Paying] enforcing it; for they are to be paid presently, in B.R. *Kjrmann & Johnsons case*. Styles 293 Mich. 45. Eliz. do pass. (b)

in C.B. *Riches case*.
b) Ibid.

11. Note, That by intendment of Law, a Devise shall be for the benefit of the Devisee, and not to his prejudice: As if Land to the Value of 3 *l. per annum* be Devised to A. and that A. shall pay out of it 50 *s. per annum*. In this Case A. hath but an Estate for life, for he may pay it out of the Profits of the Lands, and is sure to be at no loss. But if it be Devised to B. for life, the Remainder to A. paying 50 *s. per annum* out of it: In this Case A. hath a Fee-simple by Implication; because after the Payment thereof A. may dye, before he can receive satisfaction for the same out of the Profits of the Land; and therefore such Devise shall be a Fee-simple, because the Law intends that the Devise was for the benefit of the Devisee. (c)

c) Co. 6. part. 16. *Colliers case*

12. Note also, That if a Man hath Lands in Fee, and Lands for Years, and he Deviseeth all his Lands and Tenements; the Fee-simple Lands pass only, and not the Lease for Years. (2) If a Man hath a Lease for Years, and no Freehold, and Deviseeth all his Lands and Tenements, the Lease for Years passeth. (3) That if one Deviseeth his Lands which he hath by Lease, to his Executor for life, the Remainder over, that there ought to be a special Assent thereunto by the Executors as to a Legacy; otherwise it is not Executed. (d)

13. B. R. 1651.
14. B. R. 1651.
15. B. R. 1651.

d) Trin. 7. Car. in B.R. *Rose & Bartlets case*.

Co. 1. part.

213. 3. 1. 1.

Trin. 14. Jac.

B.R. *Moo. Rep.*

no. 1164.

13. A. Devised his Lands in London to his Son and his Heirs, after the decease of his Wife; and in Case his Daughter should Survive his Wife, and his Son, and his Heirs, that then the Daughters should have it for Life, and after their death I. and R. should have the same, and that they should pay 6 *l. 16 s.* yearly to the Company of *Merchant-Tailors* to be disposed of to Charitable Uses. In this Case three Points were Argued: (1) Whether the Wife had an Estate for life by Implication of the Will? And it was Resolved, That she had. (2) Whether the Son had a Fee-simple, or Fee-tail? And it was Resolved, That he had a Fee-tail by Implication of these words, viz. [if his Daughters, Survive his Wife, and his Son and his Heirs]. whereby it is plainly implied, That the Heirs there intended are the Heirs of his Body, and not his Heirs in Fee; for so long as the Daughters live, the Son could not dye without a Collateral Heir. (3) What Estate I. and R. have after the death of the Daughters? And as to, That it was Resolved, That they have a Fee-simple by Reason of the Annual Payment of Money; and it is not to be regarded what Annual Value the Land is of, over and above the Sums they pay; for every Sum of Money paid or payable doth cause the Devisee

to have a Fee-simple. And *Coke* Chief Justice said, That a Devise to A. and his Successors is a Devise of a Fee-simple, without the word [Heirs,] because it impliyes a Fee-simple, although it wants the expresse words.

Between L. Plaintiff, and B. Defendant. L. Seised of Land in Fee Devised it unto Two Persons *Equaliter*, and to their Heirs. Whether this made them Joynt-Tenants or Tenants in Common, was the Question? It was holden by the whole Court, That they were Joynt-Tenants and not Tenants in Common.

Lown & Beads case. Anders. par. 2. case. 10.

A Man Seised of Lands Devised them by his Testament to his Wife to dispose and imploy them for her and his Sons at her own Will and Pleasure. And it was held by *Dyer*, *Weston*, and *Welch*, That she had a Fee by such words, as if he had Devised the Lands forever: For the Construction of Law supplies the defect in these words of the Devisor, according to his meaning. And it was held by *Dyer* and *Welch*, That the Estate in her is Conditional; because these words *ea intentione* make a Condition in every Devise, but not in a Feoffment, Gift or Grant, unless it be in Case of the King: And these words do amount as much as to say, she should not convey it away to a Stranger, but keep it and give it to his Sons.

Pasch. 6. El. Moo. Rep. nu. 162.

S. Seised of Land in Fee, holden in Socage, and Devisable in *Gavelkind*. Devised it to his Feme for her life, paying 3 *l. per annum* to T. his Son during his life; and that he should take but Two Load of Wood for Fire-boot: And if the dyed before the said T. then he Devised all his Lands to R. his Son, paying to the said T. 3 *l. per annum*, and paying to such one of his Sisters 20 *s.* and to another Sister 20 *s.* The Feme dyes. R. enters. The Question was, what Estate R. had by this Devise. And it was Adjudged, he had a Fee; For when he Devised it to his Feme for life expressly, &c. and to R. generally without limiting the Estate, and appointed him to pay to T. 3 *l. per annum* during his life, That carries in it an Intendment that he should have Fee, especially when his Father therein further willed, That his Son R. should pay two other Sums in Gros, and none of them to be out of the Profits, it is by Intendment and by Implication a Fee; wherefore upon the first Argument it was Adjudged for the Defendant; for they said, That these Things which have been so often Adjudged ought to rest in Peace. *Vide 4. Ed. 6. tit. Estates 78. 29. H. 8. Br. Testam. 18. Dyer. 371. Wellock & Hamonds Case. 32. & 33. Eliz. Cited in Borastons Case. Co. 3. 20, 21. And Colliers Case. Co. 6. 16.*

Pasc. 17. Jac. B. R. Spicer vers. Spicer Coke the Queens Attourney demanded of the Court. A Man hath Two Daughters, being his Heirs, Deviseb his Land to them & their Heirs, and dyes. Whether shall they take as Joynt-Tenants by Devise, or as Coparceners by Descent? And all the Justices held clearly, That they shall have it as Joynt-Tenants; for the

Devise giveth it them in another Degree then the Common Law would have given it them, and after the benefit of Survivorship between them. Anonimus Cro. par. 3. B. R.

A Man

*e) Dyer's Read.
on Stat. of Wills.
Sect. 3. §. 3.*

A Man by the Premises of his Will Deviseeth his Land to I. S. in Fee, and by the Sequels he Deviseeth the same Land to I. N. in Fee, they both shall take by this Testament, and shall be Joynt-Tenants. (e)

f) Ibid. §. 2.

A Devise made *Canonici Ecclesie Catholice Pauli Lond. in perpetuum*, is a good Devise to all the Canons joyntly in Fee, and the Survivor shall have the Entierty; the Law is otherwise in Case of a Devise made *Civitati Lond. in perpetuum*; the Corporation of the Mayor and Commonalty shall take by this Devise. (f)

g) Ibid. §. 16.

A Man hath Two Wives, and he Deviseeth his Land to his latter Wife in Fee; the first Wife shall have it. (g) Likewise if one

h) Ibid. §. 17.

hath Two Sons called I. and one of them is a Bastard, and Born before Marriage, and he makes a Devise to his Son I. the Legitimate I. shall have it, and not the Bastard. (h)

i) Ibid. §. 18.

A Man hath Issue a Son, and Land is Devised to the Father *Habend. sibi & Hæred. de corpore suo Legitime procreand.* and after the Devisee hath Issue another Son, the second shall have the Land. (i)

*Mich. 15. 16.
Eliz. Anderf.
case. 100.*

A Man Seised of Three Messuages, Devised by his Testament to his Son A. one of them, Naming it, and A. to enter after his Wives death; and Devised another of the Messuages to his second Son, paying 10 l. to his Sister, and he to enter at his Age of 21. Years, and Devised the Third Messuage to his Third Son in like manner as to his Second Son. And after in his Testament willed, That if either of his Sons dyed before 21. Years of Age, that then his part should be divided among the Survivors, and each of them to be the others Heir; they all attain to the full Age, and the Two Younger Sons paid their Sister the several Sums as was appointed in the Will. The Question being what Estate the Two Younger Sons had in those Messuages Devised them by the Will? it was held a Fee-simple.

CHAP. X.

Certain Cases touching Devises of Land by way of Entail.

1. *How Lands Devised by way of Entail, may happen to be de-vested out of one, and be vested in another, upon the birth of an Issue in Tail.*
2. *Tenant in Tail may not by any Devise, Condition, or Limitation be Barred from Alienating by suffering a Common Recovery.*
3. *A Difference in Point of Entail between Devises by Will, and Grants by Deed.*
4. *The several ways of Entails by Devise; with the difference between Devising Semini suo, and Sanguini suo.*
5. *The Question whether Issue born or not at the time of making the Devise, may put a difference between an Estate-Tail and Joynt-Tenancy.*
6. *What shall be a Fee-simple by Deed, which is but an Estate-Tail by Devise.*
7. *In what Cases the Younger Son may have Fee-simple, and the Elder but an Estate-Tail.*
8. *Otherways how an Estate-Tail may be Created by Devise.*
9. *Instances of Law for further illustration of Entails by way of Devise.*
10. *In what case the Word [Or] shall be taken for [And] to Create an Estate-Tail by Devise.*
11. *Other Cases of Estates-Tail by Devise with Cross-Remainders.*
12. *An Estate-Tail by Devise, with implied Remainder.*
13. *How there may be a Devise of an Estate-Tail of Rent as well as of Land; and how a Tail limited to some Lands, shall not extend to others therewith Devised.*

1. **A** Man Seised of Lands in Fee, Devised them to his Wife for life, and after to his Two Sons (if they had not Issue Males) for their lives; and if they had Issue Males, then to their Issue Males; and if they had not Issue Males, then if any of them had Issue Male, to the said Issue Male: The Wife dyed; the Sons entered into the Lands; and then the Eldest Son had Issue Male, who afterwards entered; the Younger Son put out the Issue. In this Case the Lands by the birth of the Issue Males are

divided

a) Hill. 13. Jac.
in B.R. *Blanch-
fords* Case.
Godbold. 266.

divested out of the Two Sons, and vested in the Issue Male of the Eldest, and he hath an Estate-Tail therein. (a)

2. A Man Seised of Lands in *Capite*, Devised them to his Wife for life, and after her decease his Son *John* to have it; and if his Son *John* marry, and have by his Wife any Issue Male of his Body Lawfully begotten, then his Son to have it; if no Issue Male, then his Son *Thomas* to have the House; and if *Thomas* marry having Issue Males of his Body, his Son to have the House after his decease. And if any of his Sons or Issue Males go about to Alien or Mortgage the House, then the next Heir to enter, &c. In this Case it was (1) Resolved, That the Sons had an Estate-Tail in them severally, and to the Heirs Males of their Bodies; for that these words [if he have no Issue Male his Son *Thomas* to have it, are sufficient to create Tail to *John*, and so of the rest. (2) Resolved, That no Condition or Limitation, be it by Act Executed, or by Limitation of use, or by Devise by last Will, can Bar Tenant in Tail to Alien by suffering a Common Recovery. (b)

b) Hill. 8. Jac. in
the Court of
wards. *Sandys*
Case. Co. 9.
part. 128.

3. If a Devise be made of Land to A. B. and the Heirs Males of his Body, and he hath Issue only a Daughter, who hath Issue a Son, the Son shall not take by this Devise: Or if such Devise be made to him and the Heirs Females of his Body, and he hath Issue only a Son, who hath Issue a Daughter; she shall not take by this Devise. (c) And here Note, That in point of Entails there is a Difference between Devises by Will and Grants by Deeds; for if a Devise of Land be made to A. B. and to his Heirs Males; by this Devise A. B. hath an Estate-Tail: Otherwise it is if such a Limitation be made by Deed; for if one by Deed give Land to another and his Heirs Males, by this the Donee hath a Fee-simple, and his Heirs General shall have it. (d) But if a Devise of Land be to A. B. and to the Eldest Heirs Females of his Body, by this Devise all his Daughters, and not one of them only shall have it. (e) And if a Man Devise his Land to his Wife for life, and after to his own right Heirs Males, and he hath Issue Three Daughters, whereof one after his death hath a Son: In this Case, and by this Devise the next Collateral Heir Male of the Devisor, and not the Son of the Daughter shall have the Land. (f)

c) *Terms of
Law. tit. De-
vise. Co. sup.
Lit. 25. Plow.
414.*

d) 27. H. 8. c. 17

e) *Coo. sup.
Lit. 27.*

f) *Trin. 9. Jac.
Adjudged
Gurtis Case.*

If a Man Devise his Land to A. B. and to his, or to the Heirs Males, or Heirs Females of his Body, or of his Body begotten; or to him and his Issues Male, or his Issues Female; or to him and the Heirs Male of his Body begotten on M. or to him and E. his Wife, and the Heirs Male, or the Heirs Female of their Two Bodies begotten; or to him and his Heirs, if he shall have any Heirs of his Body, else that the Land shall revert; or to him and

and his Heirs if he shall have any Issue of his Body; or to him and the right Heirs Male of his Body; or to him and his Heirs; provided that if he die without Heirs of his Body, that then the Land shall revert; by all these and such like Devises an Estate Tail may be Created of the Land so Devised. (g) Likewise if one Devise his Land in *Dale* to A. B. & *semini suo*; by these Words A. B. hath an Estate Tail; But if he say, I give my Land in *Dale* to A. B. & *sanguini suo*; it is said, That by this Devise A. B. hath the Fee-simple of the Land.

g] Brown. Rep.
1. part. 5. & 2.
part. 75.

5. Suppose a Devise be made thus, *viz.* I give my Land in *Dale* to A. B. for life, the Remainder to C. D. and E. his Wife, and their Children; or to them and their Men-children; or to them and their Issues; by these Devises (if C. D. and E. his Wife have no Children at the Time of the Devise) an Estate Tail is Created; but if they have any Children at the time of the Devise, then hereby is Created an Estate for all their lives only in Joynt-tenancy. (h)

h] Sheaph. E-
pit. c. 155. ver.
Testa. p. 960.

6. If one Devise his Land to his Wife for life, the Remainder to his Son; and if his Son die without Issue, not having a Son, that then it shall remain over; this is a good Estate Tail. (i) Likewise if Lands be Devised to A. B. and his Heirs Males, or his Heirs Females, without saying [of his Body] by this Devise A. B. hath an Estate Tail: But if such a Limitation be by Deed, it is said to be a Fee-simple. (k)

i] Brownl. 2.
part. 270.

k] Lit. Sect. 31.
H. 6. 25. 27. 9.
H. 8. 27.

7. If one having Two Sons Devise part of his Land to his Eldest Son and his Heirs, another part of his Land to his Youngest Son and his Heirs; and if either of them dye without Issue, that then the other shall be his Heir; by this Devise either of them hath an Estate Tail, and no Fee-simple. (l) But if one Devise his Land to his Eldest Son and his Heirs, and if he dye without Heirs of his Body, that it shall remain to his Youngest Son and his Heirs; by this Devise the Eldest Son hath an Estate Tail, and the Youngest Son the Fee-simple. (m)

l] Hill. 22. Jac.
E. R. Danyels
Case.

m] Adjudged
Mich. 9. Jac.
Wallops Case.

8. If one Devise his Land to his Son W. S. and if he marry, and have an Issue Male begotten of the Body of his Wife, then that Issue to have it; and if he have no Issue Male, then to others in Remainder; by this Devise it seems W. S. hath an Estate Tail to him and the Issues Male begotten of the Body of his Wife. (n) Also if one Devise *Long-acre* to A. and then say, *Item Broad-acre* to A. and the Heirs of his Body; by this Devise he hath an Estate Tail in both Acres. (o)

n] Coe. 9. 127.
o] Trin. 30. Eli.

9. If one Devise his Land to his Wife for years, the Remainder to his Younger Son and his Heirs, and if either of his Two Sons die without Issue, &c. that it shall remain to his Daughter and her Heirs; and the Younger Son die in the life Time of the Fa-

p] Dyer. 122.

q] Adjudged
Trin. 7. Jac. C.
B. Robinsons
case.

r] Co. sup. Lit.
20. 26. Plow.
35.

s] Adjudged
14. Eliz. Trin.
9. Jac. in B. R.
t] Co. sup.
Lit. 26.

u] Adjudged
Mich. 37, 38.
Eliz. Sale vers.
Gerard.

w] Mich. 18.
Jac. B. R. Gil-
berts case.

x] Co. 9. 128.

y] Lit. Broo.
Sect. 1. 431. Br.
Devise. 38.
Done. 44.

ther, and after the Father dyeth: it seems by this Devise the El-
der Son shall have the Land in Tail. (p) Or if one Devise his
Land to his Wife for life, and after to his Son, and if his Son die
without Issue, having no Son, (or having no Male) that then
it shall go to another; by this Devise the Son hath an Estate Tail
to him and the Heirs Males of his Body. (q) Or if Lands be De-
vised to Man and Woman unmarried, and the Heirs of their Two
Bodies; or to the Husband of A. and Wife of B. and the Heirs of
their Two Bodies; by these Devises are made Estates in Tail. (r)
10. If Land be Devised to A. B. and the Heirs of his Body,
and that if he die it shall reman to C. D. by this Devise A. B.
hath an Estate Tail, and the latter words do not qualifie the
former; but C. D. must attend the death of A. B. without Heirs
of his Body, before he shall have the Land. (s) Also if Lands be
Devised to A. B. and the Heirs he shall have by C. his Wife; by
this Devise A. B. hath a Fee-Tail, and not a Fee-simple. (t) Like-
wise if one Devise Land to his Son and his Heirs, and that if his
Son die within the Age of 21. Years, or without Issue, that the
Land shall remain over: and the Son dyeth within Age having
Issue; in this case, and by this Devise the Son hath an Estate Tail;
and [Or] in this place shall be taken for [And] (u)

11. If a Man Devise his Land in this manner, viz. I give
White-acre to my Son A. and his Heirs; *Black-acre* to my Son B.
and his Heirs; and *Green-acre* to my Son C. and his Heirs; pro-
vided that if all my said Sons die without Issue of their Bodies,
that then all my said Lands shall go to M. my Wife, and her
Heirs; by this Devise they have all of them Estates in Tail of
their Land, and as it seems Cross-Remainders to either of them
of the Land of each other. (w) Also if one Devise his Land to
A. B. and if he die without Issue Male of his Body, then that it
shall remain over to C. D. by this Devise A. B. hath an Estate
Tail. (x)

12. If a Man having Issue Three Sons Devise his Lands in
this manner, viz. One part to Two of his Sons in Tail, and a-
nother part to his Third Son in Tail; and that neither of them
shall Sell his part, but that either of them shall be Heir to other;
by this Devise either of them hath an Estate-Tail; and if one
of them die without Issue, his part shall not revert to the Eldest,
but shall remain to the other Son, for it is an implied Remain-
der. (y)

13. If one Devise to A. B. that if he and the Heirs of his Body
be not paid 20 l. Rent yearly, he and they shall distrain; by this
Devise A. B. hath an Estate-Tail of this Rent. Also if a Man
Devise his Mannor of D. to his Eldest Son, and also all his Lands
in S. in Tail; in that case the Entail is limited for the Land in S.
and

and shall not extend to the Mannor of D. But if the words had been [I Devise my Mannor of D. and all my Lands in S. to my Son in Tail,] the Son had had an Estate Tail in both. (2) But suppose a Man Devise his Lands to his Wife for Life, the Remainder to his Son in Tail; and if he die without Issue the Land to remain to A. B. and his Wife for their lives, and after their deceases to their Children. In this Case the Court was divided, whether the Children of A. B. had an Estate in Tail, or only an Estate for life. *Mich. 40. Eliz. in B. R. Goldesb. 138.*

One Devised all his Lands to another, and the Heirs of his Body begotten, and after in the same Will Devised, That if the Devisee die, the said Lands should remain to another in Fee. The Court held, That the Devisee hath notwithstanding an Estate Tail by the first words, and no Estate pass'd by the last words. *Hill. 14. Eli. Andrsf. case 84. vid. cas. 88. Ibid.*

One Devised his Land to W. his Son for Term of his Life, and after his decease to the Men-children of his Body; and in case the said W. dyed without any Man-child of his Body, that then the Land should remain to another, &c. The Testator dies; W. dies without Issue Male of his Body, &c. and the Question was, What Estate he had; the Justices of the Bench held, that he had an Estate to him and the Heirs Males of his Body. *Hill. 6. Eliz. C. B. Andrsf. case 110.*

F. Seised of Land in *Gavelkind* had Three Sons, and Devised part to one, part to another, the other part to the Third, and if either of them dyed without Issue, the other should be his Heir. It was Adjudged an Entail in each; and a Fee-simple by the words [Heir to other.] And so it was Adjudged *Hill. 32. Eliz. in Carters Case C. B.* *Mich. 13. Jac. Spark ver. Purnell. Moos. Rep. an. 1190.*

If a Devise be made to one and his Heirs, and in Case that he hath Issue a Daughter, that she shall have the Lands. If the Devisee hath Issue a Son and a Daughter, and die, the Son shall have the Land; and although the Daughter afterwards take a Husband, and hath Issue a Son, he shall not eject the other. *11. H. 6. 13. b. Roll. Abrid. tit. Devise. Lit. K.*

C H A P. XI.

Certain Cases in Law touching Devises of Land for Life only.

1. *A Devise of Land to one (not saying, How long) is an Estate only for life.*
2. *Power of Distraining Devised to one (without other words) on Non-payment of a certain Annual Sum, is only an Estate for Life.*
3. *A Devise of Land to one and his Heir, (in the Singular Number), or to one and his Children is but an Estate for life.*
4. *Several Instances of Law touching Estates only for Life by way of Devise.*
5. *Several Instances of Estates for Life by Implication, Devised.*
6. *A Devise of Land to one thereby obliged to a present Payment Creates a Fee-simple; But if Payment be to Issue out of the Profits of the Land Devised, it makes only an Estate Tail.*
7. *A Devise of an Estate for Life in Reversion.*
8. *A Devise of Two Estates for Lives; the one to some in Being, the other to others in Reversion.*
9. *A. Devise of Lands in Esse or Possé, Conditioned upon an Annual Payment to be made by the Devisee, during his or her life, which Devise is made by one in the Remainder in Fee, and not in Possession, doth pass an Estate only for life.*
10. *A Devise (by general words) of all a Mans Estate, Mortgages, &c. may pass (as to the Real) no more than an Estate for Life, and not a Fee by Implication,*
11. *The Law ever accommodates the Testators words, whatever they be, (as nigh as possible) to his intent and meaning.*

a) Fitz. Devise

111. Goldesb.

183.

b) Co. sup. Lit.

9. Perk. Sect.

57-239. *New**Terms of Law.*

tit. Devise.

c) Trin. 2. Car.

B. R. *Daniels**case.*

1. **I**F a Man Devise his Land to A. B. and say not how long, nor for what Time, by this Devise A. B. hath an Estate only for Life in the Land. (a) But if a Man Devise his Land to A. B. and his Assigns, without saying [For ever,] it hath been a Question whether he hath only an Estate for Life, as was held by some; (b) or a Fee-simple, as hath been Affirmed by others. (c)

2. In the latter part of the last Chapt. it was said, That it was an Estate Tail of the Rent, if one Devised to A. B. that if he and the Heirs of his Body be not paid 20 l. Rent yearly, he and they shall distrain. But now if the Devise only be, *That if A. B. be*

not

not paid 20. l. yearly, he shall distrain, &c. by this Devise A. B. hath only an Estate for Life. Likewise if one devise a Rent of 10 l. out of his Land to be paid quarterly, and say not how long the Rent shall continue; this is but an Estate in the Rent only for Life (d)

d] Co. sup. Lit.
147. 8. 85.
Brownl. 2.
part. 74, 75.

3. If one Devise his Land to A. B. for his Life, or to him (without any more words) or to him and his Heir (in the Singular Number,) or to him and his Children, (he then having Children.) By all these and such like Devises A. B. hath only an Estate for life in the thing Devised. (e) And if one Devise, That A. B. shall have and occupy his Land in D. (and say not how long) by this Devise A. B. shall have the Land (as aforesaid) only for life. (f) But If I Devise that A. B. shall enter into my Land, (and say no more) by this Devise A. B. hath no Estate at all, but power to enter into the Land only. (g)

e] Fitzh. De-
vise. 16. Co.
6. 16. Perk.
Sect. 577.
f] Pasch. 9. Jac.
Newmans case.
g] Dyer. 342.

4. A Man having a Son and a Daughter dies; Lands are Devised to the Daughter, and the Heirs Females of the Body of the Father; by this Devise the Daughter hath only an Estate for her life; for there is no such person, for she is not Heir. (b) Likewise if one Devise his Land in D. unto A. B. for life, and after to the next right Heir, (in the Singular Number) and to his right Heirs for ever; by this Devise A. B. hath only an Estate for life. (i) Or if one Devise Land to A. B. for life, and after to the next Heir Male of A. B. and to the Heirs Males of the Body of such next Heir Male; by this Devise also A. B. hath but an Estate only for life. But if he Devise his Land to A. B. for his life, and after to the Heirs or to the right Heirs of A. B. by these Devises A. B. hath the Fee-simple of the Land. And if it be to him for life, and after to his Heirs Males, then he hath an Estate Tail. But if one Devise Land to F. G. and M. his Wife, and after their decease (or the Remainder) to their Children, by this Devise, whether they have or have not Children at the time, F. G. and M. his Wife have Estates only for their lives (k)

b] Co. sup.
Lit. 24.

i] Co. 1. 66.

5. If one Devise his Land to A. B. in Fee after the death of C. D. (being his Son and Heir apparent) by this Devise C. D. hath an Estate for life by Implication; and till the Devise take effect, the Law gives it to him by descent. The Law is the same where one doth devise his Land to A. B. after the death of his Wife; by this Devise the Wife hath an Estate for life by Implication. Likewise if a Man Devise in this manner; I give my Goods to my Wife, and that after her decease my Son and Heir shall have the House where the goods are; it is held, That by this Devise the Wife hath an Estate for life in the House by Implication. But if a Man Devise his Land to A. B. after the death of I. G. (a Stranger to the Devisor) it seems that by this Devise I. G. hath no

k] Co. 6. 16.
Goldsb. 138.
Plow. 47. 134.
Plow. 33.

Estate

[1] Broo Devise
48.52 Lit Br.
107.15 H 7.
13. New Terms
of Law. tit.
Devise. Plow.
158.414.521.

Estate at all by Implication, and that this doth but set forth the Time when the Estate of A. B. shall begin, and that the Intent of the Testator is, That his Heir shall have it until that Time. (1) The Reason of the difference is, because a Man is bound to provide for his own, not so for a Stranger; and so the Law presumes what Nature doth teach.

m] Coe. 6. 16.
3. 20. Broo.
Estates. 38.

6. If one Devise his Land in this manner, viz. I give my Land in D. to A. B. to the intent that with the Profits thereof he shall bring up my Child or my Children; or to the intent that with the Profits thereof he shall pay to I. M. 10 l. or to the intent that out of the Profits thereof he shall pay yearly 10 l. By these Devises A. B. hath only an Estate for life, albeit the Payments to be made be greater than the Rents of the Land. Otherwise it is in case the Sum of Money is to be paid presently, and not appointed to be paid out of the Profits of the Land; in which case A. B. should have a Fee-simple in the Land. (m)

n] Dyer. 371.

7. If the Father of A. be Tenant for life of Land, the Remainder to A. in Fee. And A. devise the Land to his Wife, Rending for her natural life 5 l. to the right Heir of the Father of A. by this Devise the Wife of A. hath an Estate for life after the death of his Father. (n)

o] Hill. 42. Eli.
in B.R. Co. 6.
part. 16, 17.
wilds case.

8. Land was Devise to Husband and Wife, and after their decease to their Children, they then having Issue a Son and a Daughter. In this case the Husband and Wife have but an Estate for Term of their lives, the Remainder to their Children for life, and no Estate Tail; for the intent of the Testator here shall be construed according to the Rules of the Common Law; and by the Common Law the Husband and Wife have but an Estate for their lives, with a Remainder to their Children for their lives. (o)

p] Mic. 23. Eli.
Dyer. 371.

9. The Son Seised of a Remainder in Fee, after the death of his Father who was Tenant for life, devised the same by these Words, viz. I Devise to D. my Wife the Lands which I have, or may have in Reversion, after the death of my Father, paying therefore yearly during her life, to the right Heirs of my Father 40 s. and dyed, his Father living: It was the Opinion of the Court, That no Estate passed by this Devise, but for Term of the life of the Wife, and that she should not pay the 40 s. until the Reversion did fall after the death of the Father. (p)

10. A. Seised of divers Lands in A. B. and C. the Lands in C. being in him by Mortgage forfeited; Devise the Lands in A. and B. to several Persons, and then adds this Clause in his Will: All the rest of the Goods, Chattels, Leases, Estates, Mortgages, whereof he was possessed he

he devised to his Wife, after his Debts and Legacies paid; made his Wife his Executrix and dyed. The Wife entered into the Mortgaged Lands, and devised it to the Defendant and his Heirs, and dyed. The Question was whether the Fee passed to the Wife by this Devise, by the Name of all his Estate, Mortgages, &c. It was the Opinion of the whole Court; That an Estate for life only passed unto her; and not a Fee by Implication of the general words in the Will. (q)

q) Trin. 10.
Car. in B. R.
Wilkinsons &
Merrylands
case. Cro. 1.
323.

11. Note, That there is a difference, when one Deviseeth his Term for life, the Remainder over, and when a Man Deviseeth the Land, or his Lease or Farm, or the Occupation, or Use, or Profits of his Land: For in a Will the intent and meaning of the Devisor is to be observed; and the Law makes construction of the Words to answer and satisfy his intent, and puts them into such order that his Will shall take effect. And when a Man deviseeth his Lease to one for life, it is as much as to say, He shall have so many Years in it as he shall live; and that if he dyeth within the Term, that another shall have it for the Residue of the Years: And although at the beginning it is uncertain how many Years he shall live; yet when he dyeth, it is certain how many Years he hath lived, and how many Years the other shall have; and so by a subsequent Act all is made certain. (r)

r) Co. 8. part.
65. in Man-
nings case.
Pasch. 5. Eliz.
Moo. Rep. nu.
153.

A Man made his Will in this manner. [Item, I give my Mannor of Dale to my second Son. Item, I give my Mannor of Sale to my said Son and his Heirs] what Estate he had in the Mannor of Dale was the Question. It was held by Dyer, Weston and Welch, That in the first he had but an Estate for life; for that it is as much as to say, as if he would give his Mannor of Dale to him for his life; for that as much is included therein without saying [His Heirs.] And that [Item] seems a new Gift to a greater degree in the second place to make amends for the other. Brown, e Contra, and that the [Item] is a Conjunction Copulative, and that the word [Heirs] expressed in the latter Clause extends to both the Mannors. But if the Word [Heirs] were put in the Gift of the former Lands, it would be otherwise. Dyer; if in the first place or Clause there were not any person named, but that the words were [Item, I give the Mannor of D. Item, I give the Mannor of S. to I. K. and his Heirs,] there and in that Case it would refer to both the Mannors.

Pasch. 17. Eli.
Baker & Ray-
monds case.
Anderf. case.
251.

W. C. by his Will Devised a Messuage in these words, viz. I give to A. L. my Cousin the Fee-simple of my House; and after her decease to W. her Son. The Judges held, That A. L. had an Estate for

for life, and her Son a Fee-simple in Remainder: And so it was adjudged.

Trin. 39. Eliz.
Dracon verſ.
Marſh. Moo.
Rep. nu. 804.

R. D. Seised in Fee of a House, and Possess'd of Goods, made his Will in these words, viz. *The rest of my Goods, Lands, and Moveables whatsoever, after my Debts, Legacies, and Funerals paid, to my Three Children, I. T. and M. equally to be divided amongst them.* And it was Adjudged, That they have an Estate only for life in the House, and are Tenants in Common, not Joynt-tenants.

CHAP. XII.

Certain Cases in the Law touching Devises of Leases, or for a Term of Years.

1. In what Case the Word [Shall] is taken for [Should] in Devise of a Term.
2. A Devise of Lands for 99 Years, may be only for no more of that Term, then the Issue Male of the Devisee shall continue.
3. The Devise of a Term to one and his Heirs, shall go to the Devisees Executors or Administrators, and not to his Heirs.
4. Chattel-Leases and Leases for Years pass not by a Devise of all his Lands and Tenements.
5. By a Lease for Years Devise for Life, doth pass the whole Term; yet it is not an Estate for Life.
6. The whole Interest of a Lessee in his Lease-Lands, doth pass by a Devise of his Lease, Term, Farm, Profits, Tenure, or Occupation thereof, as well as by any other words.
7. The Residue of a Term, is as the Term it self.
8. A Man may Devise such an Estate by Will, which he cannot make by Act Executed: Or he may Create an Interest by his Will, which by Grant or Conveyance in his life time he could not do.
9. That may be the Devise of a Lease for Years in Law, which doth not seem to appear such in Fact.
10. The whole Term, though not named, shall pass by a Devise, where no other can pass by Implication.

IF one Devise his Land unto his Executors until his Son shall come unto the Age of 21. Years, the Profits to be employed towards the performance of his Wills; and when he shall come to that Age, that then his Son and his Heirs shall have it. By this Devise the Executors shall have it until he be of 21. years of Age;

Age; and if he die before that time the Executors shall also have it until the time he *should* have been 21. Years of Age, if he had lived so long; and the word [*Shall*] in this case is taken for [*Should*.] (a) Likewise if one Devise his Land to his Executors for the payment of his Debts, and until his Debts be paid; by this Devise the Executors have but a Chattel, and an uncertain Interest, and they and their Executors shall hold it until the Debts be paid and no longer. (b)

a] Co. 3. 20.

b] Co. sup. Lit. 42.

2. If one Devise his Land to A. B. and the Heirs males of his Body for the Term of 99. Years; it seems that by this Devise A. B. hath but a Lease for so many Years, if the Heirs Males of his Body shall so long continue, and that for want of Issue Male the Term of Years shall expire. And in this case the Executor or Administrator, not the Heirs Males of A. B. shall have it after his death. (c)

c] Co. 10. in Leonard Lovells case. 87. 46.

3. If one possessed of a Term of Years, Devise the same to another and his Heirs, or his Heirs Male; by this Devise the Executors or Administrators, not the Heirs of the Legatee shall have it. (d) So that if a Lessee for Years of Land Devise all his Interest therein to his Wife, if she live so long, and after her death if any part of the Term be to come, Devise the same to A. B. his Son, and to the Heirs of his Body; in this Case, and by this Devise the Executors or Administrators of A. B. and not his Heirs shall have it.

d] Co. 10. 46. Lampres case. Perk. 558. 556.

4. If a Man Devise all his Lands and Tenements in D. yet Leases for Years do not pass by these words; for by Lands and Tenements is intended Frank-tenements or Free-hold, and not Chattels. (e)

e] Broo. Abr. tit. Done. nu. 41.

5. If one hath a Lease for Years of Land, and Devise it to A. B. for life; by this Devise the whole Term is Devised, and A. B. shall have the whole Term if he live so long, and yet A. B. shall not have an Estate for life by this Devise. So likewise the Law seems to be the same upon a Grant by Deed made in that manner.

f] Co. 4. 66. & 7. 23. Plow. 420.

(f) And if a Man possessed of a Term of Years of Land Devise his Term or his Lease, or the Land it self by a Devise, in either of these words the whole Term doth pass. (g) A Term of Years is Devised to the Church-wardens of the Church of D. and to their Successors: This is not good; but for Goods so Devised the Law is otherwise. (h) A Man who hath a Term, Devise the Land to one and his Heirs; the Devisee dyeth, and hath Executors; his Heirs shall have the Land, and not his Executors: The Law is otherwise, if the entire Term were so Devised. (i)

g] Brownl. Rep. 1. part 41. 45 & 2. part. 308, 309.

h] Dyer's Readings on Stat. of Will. Sect. 3 §. 6. i] Dyer. ib. §. 7.

6. If a Lessee Devise his Lease, or his Term, or his Farm, or his Profits, Tenure or Occupation thereof; by either of these Devises, his whole Lease and all his Interest in the

H h

Land

4] Dyer 122.
33. 128. Co. 1.
83. 6. 42. & Dy-
cr. 4. 33.
5] Plow. 524.

Land is bequeathed as well as by any other form of words. (k) But if a Man Devise his Land only for so many Years as his Executor shall name, it seems this Devise is not good; (l) Yet if it be for so many Years as A. B. shall name, and he name a certain Number of Years in the Testators Life Time, this is a good Devise.

7. A Man possessed of a Term of Years, may Devise all the Residue of that Term of Years that shall be to come at the Time of his death. And if a Testator having only a Term of Years in certain Lands, doth Devise the said Land to A. B. and doth not say for what Time; it seems that by this Devise the whole Term is devised, unless the Testators Intent doth appear to be otherwise.

8. A Man possessed of a Term for 40. Years, by his Will Devise the same to I. S. after the death of his Wife; and that the Wife should enjoy it during her life; and that I. S. should neither Devise it nor Sell it, but leave it to descend to his Son; and in the mean Time my Will is, That my Wife shall have the use thereof during her life, yielding 10 l. Yearly to I. S. during her life at Two Feasts, and made his Wife Executrix and dyed. The Wife entered, and paid the 10 l. Yearly according to the Will. In this Case Three Points are Resolved. (1) That I. S. doth not take by way of Remainder, but by way of Executory Devise: And a Man may Devise such an Estate by his Will, which he cannot make by Act executed. And that the Case is no more but this, That after the death of I. S. the Wife should have the Residue of the Term. (2) The Devise is good, being but a Chattel, which may vest and divest at the pleasure of the Devisor. (3) That there is no difference when one Devise his Term, the Remainder over; and when a Man Devise his Land, or his Lease, or the Use, or Occupation, or the Profits of his Land; That a Man by his Will may Create an Interest, which by Grant or Conveyance he cannot Create in his life Time. (m)

n] Co. 8. part
96. Marb. Man-
nigs case.

9. A. Devise his Lands to his Daughter and her Heirs, when she came to the Age of 18. Years, and that the Wife should take the Profits of the Land to her Use, without any accompt to be made, until the Daughter come to 18. Years, and made his Wife his Executrix, and dyed; provided the Wife should pay the old Rents, and find the Daughter at School; the Wife enters, proves the Will, takes Husband, and dyes: It was found that all the Conditions were performed, and that the Daughter was within the Age of 18. Years. It was Resolved in this Case, That it was a Term for Years in the Wife, and a good Lease. (n)

o] Trin. 17. Jac
C. B. Black-
burns case
Hutton. 36.

10. A Man was Lessee for 40. Years of a House, and by his Will gave the House to I. S. without limiting any Estate, That he should have in it. It was the Opinion of the Court, That he should have the whole; for no other Estate in the House either for Life, or at Will, shall pass by Implication, or for one Year or Years; and therefore the whole shall pass to the Devisee. (o)

o] Mich. 14. El.
Dyer. 307.
Anders. Rep.
case. 105.

A Man possessed of a Term of Years, Devised the same in these words, viz. [*The residue of my Goods, Moveable and Immoveable I give to my Son John, whom I make my Executor, and to him I give my whole Years that I have in my Farm of M. and if he die, I give it to my Daughters.*] John the Executor and Devisee proveth the Will, claiming the Lease according to the Will, and dyeth Intestate: His Administrator for good Consideration Selleth the Lease that remains. Whence the doubt or Question was, whether the Daughters or the Assignee should have the Lease? The Case was refer'd to the Two Chief Justices, and Justice *Walmesley*, who all agreed, That the Assignee should enjoy the Lease, and not the Daughters.

Q. Whether a Devise to them in such manner be void?

One made a Lease for life, after Leased the same to A. for 99. Years if he so long lived, to Commence after the decease of the Lessee for life. And if A. dyed during the said Term of 99. Years, or the Lease otherwise determined, and after the death of the Lessee for life, then the Lessor granted for him and his Heirs, that the Land should remain to the Executors of A. for 20. Years. Lessee for life dyes. A. Leased for 20. Years Rendring Rent, and dyes Intestate. B. takes his Administration, and brings Action of Debt for the Rent. It was Adjudged, That it doth not lye. for it seem'd to *Gandy* and *Yelverton*, That the Contingent of 20. Years was never Vested in A. But if A. had made Executors, he might take by way of Purchase, (Executors being in name of Purchase: As in *Crammers* Case. 14. *Eliz. Dyer.*) But if it had been limited to the Executors for Payment of the Debts of A. or the like, then by the intent apparent there would be an Interest in A. and in the Executor for the use of A. as *Popham* and *Fenner* agreed in point of Law as to an Action of Debt.

Mich. 44. & 45.
Eliz. B. R.
Spark &
Sparks case.
Yelv. Rep.

A Man made his Will in this manner, viz. [*I have made a Lease for 21. Years to I. S. paying but 20 s. Rent.*] And it was held, That it was a good Lease by the Will. For that Word [*I have*] shall be taken in the Present Tense, as is the word [*Dedi*] in a Deed of Feoffment.

Trin. 3. Eliz.
Moo. Rep. nu.
101.

A Man Seised of a Mannor, part in Demesnes, and part in Lease upon Rent Suit and Service. Devised by his Testament to his Wife during her life all his Lands in Demesnes, and also by the same Testament did Devise to her all his Services and high Rents

Trin. 3. Ed. 6.
Moo. Rep. nu.
24.

for 15. Years; and further by the same Testament did Devise all his Mannor to another after the death of his Wife. And it was Agreed by all the Justices, That the last Devise took not effect for any part of the Mannor till after the death of the Wife: and that the Heir after the Expiration of the 15. Years, and during the Wives life shall have the Services and Chief Rents.

Mich. 5. Jac. B.
inter Mallet &
Sir H. Sack-
ford. Roll. Abr.
tit. Devise.

If a Man possessed of a Lease for Years of Land, Devise the same to one for Life, the Remainder to another; although the first Devisee hath the whole Estate or Term in him, and no Remainder can depend thereon at Common Law, yet it is a good Devise to the second Devisee by way of an Executory Devise.

11. H. 4. 84. Tr.
39. El. in Cam.
Scac. inter Ed-
monds & Buf-
kin lit. Trin.
39. Eliz. B. R.
Rol. libid. lit. A.

If certain Lands be Devised to one, he cannot take them without the delivery of the Executor. Or if a Man be possess'd of a Lease for Years of Land, and Devise the same to another, the Devisee cannot have it, or enter upon it without the Executors or Administrators Consent.

C H A P XIII.

Law-Cases touching Devises of Reversions or Remainders.

1. *What Devise of a Reversion is good, and what Remainder may be Devised.*
2. *As the Limitation, so the Devise of a Remainder after a Fee, is void.*
3. *In what Case the Devise of a Remainder of a Chattel-real, may be void.*
4. *The Devise of a void Limitation, is a void Devise.*
5. *A Devise in Remainder of Goods, is void.*
6. *In what Case the Devise of a Remainder over in Fee, after Lease for Life made by Executors, is void.*
7. *The Difference between a Remainder Entail'd by Devise, and Entail'd by Deed.*
8. *A Remainder Devised to a Church, accrews to the Parson of that Church.*
9. *A Refusal in one to take by a Devise, shall not prejudice another in Reversion or Remainder.*
10. *How the Devisors Daughters Issue (without naming her) shall have the Devised Remainder before the Issue of his Sons.*
11. *A Termor of a 100. Years to come, Deviseth it to one for Life, the Remainder over, it is a void Remainder.*

12. *A Devise of a Remainder in Fee after a Lease, which Devise is made by him in Remainder, is a void Devise, if the Lessor Re-enter.*
13. *Several Cases, wherein he in Remainder may Devise his Remainder.*
14. *Fee-simple Devised to one, the Remainder cannot be Devised to another, albeit the first Devise were but Conditional.*
15. *A Term of Years by way of Remainder is Devisable; but a Devise by way of Entail with Remainder over, is void.*
16. *Lessor may Devise the Reversion of Land for Life, notwithstanding a Feofment in Fee.*
17. *Remainder of a Rent-charge in Fee, maybe Devised to one, where the Land, out of which the Rent doth arise, is Devised to another.*
18. *A Devise may be good for the Reversion of a Term, where not for the Rent.*
19. *The Devise of a Remainder may be good, where yet an Estate Tail shall precede.*
20. *He in Remainder shall take presently, where the Devisee for Life is incapable of taking by Devise.*
21. *Though a Man cannot Devise to himself, yet he may Devise a Remainder to his own right Heirs.*
22. *A Man may Devise a Reversion by the Name of all his Inheritance or Hereditaments.*
23. *Devises of Remainders to the next of Blood.*
24. *Where the Devise of a Remainder after the Remainder, makes the former Remainder but an Estate for Life.*

1. **I**F a Man Devise his Land to B. C. for life, the Remainder to the next of Kin, or next of Blood of B. C. this is a good Devise of a Remainder. (a) Or if a Lessor Disseiseth his Lessee for life, and makes a Lease for life to another for Term of life of the first Lessee, the Remainder over in Fee; though the first Lessee enters, yet he in the Remainder may Devise his Remainder. (b)

2. If one Devise his Lands to A. so as he render 20 s. per annum to B. and if he fail thereof, then his Estate to cease, and to remain to B. this Devise is good, but the Limitation of the Remainder is void, because a Remainder cannot be limited after a Fee. (c) Therefore if a Man makes a Lease for Years upon Condition, that if the Lessor disturb the Lessee within the Term, that the Lessee shall have the Fee, and maketh Livery accordingly, and after the Lessor doth disturb the Lessee for Rent, where none is in arrear and after Devise his Reversion, this Devise is not good. (d)

a) Fitzh. Devise. 27. Plow. 523.

Perk. Sect. 509. 510. Broo.

Corporat. 55. b) Dyer. in St.

of wills. 32. & 34. H. 8. Sect.

8. §. 1. c) Pasch. 29.

H. 8. Dyer. 33.

d) Dyer. Readings in Stat. of wills. Sect. 8. §. 4.

3. A Man possessed of a Term for 40. Years, Devised that his Eldest Daughter should have the same to her, and the Heirs of her Body, the Remainder, if she dyed without Issue Within the Term, to C. his second Daughter in Tail. The Eldest Daughter took Husband, and dyed within the Term without Issue: Her Husband Sold the Term. It was the Opinion of the Court, That his Sale thereof was good; and that the younger Daughter had no Remedy for it, because it was a void Remainder, being of a Term, which was a Chattel-real, and so is to go to the Husband. (e)

e) Trin. 28. H.
8. Dyer. 7.

4. A Lease was made to A. for 41. Years if he should so long live, and if he dyed within the said Term, that then his Wife should have it for the Residue of the said Years. It was held, That the limitation to the Wife in Remainder was void; for that the Term ended by the death of A. and then there was no Residue to remain to his Wife. (f)

f) 9. Eliz. Dyer
254. Plow.
Com. 190.

5. A Man possessed of certain Goods, Devised them by his Will to his Wife for life, and after her decease to I. S. and dyed: I. S. in the life time of the Wife, did Commence Suit in a Court of Equity, there to secure his Interest in Remainder. A Prohibition was granted in this Case; and the Reason was, because a Devise in Remainder of Goods was void, and therefore no Remedy in Equity, for *Equitas sequitur Legem*. It was agreed, That a Devise of the Use and Occupation of Lands, is a Devise of the Land it self, but not so of Goods; for one may have the Occupation of them, and another the Interest in them. (g)

g) Trin. 17.
Car. in C. B.
Marsh. 106.

6. Suppose a Man Deviseth a Reversion, depending upon an Estate for life, to the Parson of D. and to his Successors; if the Parson die, and after a new Parson be made, and the particular Tenant die also, the new Parson shall have it. Also if a Man Devise Land to one for Term of life, the Remainder over in Fee, and the Devisee for life refuse, yet he in the Remainder may enter; but if the Will were, That the Executors shall make a Lease for life, the Remainder over in Fee, and they offer to make a Lease accordingly, and the Lessee refuseth, he in the Remainder shall not have the Remainder. (h)

h) Dyers Read.
ubi sup. Sect.
3. §. 2. & 9.

7. I. S. hath issue Two Sons, and dyeth; the Elder hath Issue a Daughter who hath Issue a Son, and dyeth. Land is given by Testament to one for life, the Remainder to the next Male of the Body of I. S. begotten; the second Son of I. S. shall have the Land, and not the Son of the Daughter; It would be otherwise if the Remainder were so Entail'd by Deed. (i)

i) Dyer. Ibid.
Sect. 3. §. 12.
k) Ibid. §. 19.
& 21. R. 2.
Plowd. Com.
523.

8. If Land be Devised to one for life, the Remainder to the Church of D. the Parson of the said Church shall have it. (k) And if a Man willeth that after 20. years after the death of the Devisor

vifor I. S. fhall have the Land in Fee; the Heir of the Devifor fhall have the Land during the Term, and not the Executor. (l)

l) Dyer. Ibid.
§. 24.

9. A Man Devifeth his Land to his Daughter and Heir, being a *Feme Covert*, and to the Heirs of the Woman, the Reversion over in Fee, and dyeth; the Husband refuseth to take by the Devife, he in the Remainder entereth; he fhall retain the Land during the lives of the Husband and Wife; but after their deceafe he Ifsue of the Wife may enter upon him. (m)

m) Ibid. §. 22.

10. A Man Seifed of Land in Fee, hath Ifsue Two Sons and a Daughter; the Father Devifeth the Land to his Wife for Term of life, the Remainder *propinquiribus de sanguine puerorum* of the Devifor; the Daughter hath Ifsue and dyeth; the Ifsue of the Daughter fhall have this Remainder; and although that the Sons have Ifsue after, yet their Ifsue fhall not have it. (n)

n) Ibid. §. 23.

11. A Man hath a Term of a Hundred Years to come, and he Devifeth this to one for Term of life, the Remainder over to I. S. this is a void Remainder; it were otherwife if the Devife were, that the Devifee fhall have the Occupation of the Land during his life, the Remainder over. (o)

o) Ibid. Sect. 4.
§. 10.

12. A Lease is made for life, the Remainder over in Fee, referving Rent by Indenture, and for default of Payment, that it fhall be Lawful for the Lessor to enter and detain during the life of the Lefsee; he Re-enters for the Rent Arrear; he in the Remainder Devifeth the Remainder; fuch Devife of the Remainder is void (p)

p) Ibid. Sect. 8.
§. 6.

13. If Land be given to Two Perfons, *Habendum* to the one for life, and after his deceafe to the other in Fee; he that hath the Fee may Devife his Reversion thereof. (q) Likewise if Land

q) Ibid. §. 10.

be given to one for life, and that after his death it fhall defcend to I. S. in Fee, he may Devife this Remainder. (r) Or if a Lease be made *dummodo solveris* 10 l. to the Lessor for his life, he may Devife the Reversion, with the Rent. Or if a Lease be made to an Infant or Feme-sole for life, the Remainder in Fee, and the Infant at his full Age, or the Feme after Coverture difagree; he in Remainder may Devife his Remainder. (r)

r) Ibid. §. 12.

s) Ibid. §. 16.
18.

14. If the Fee-fimple of Land be Devifed to one, the Remainder cannot be Devifed to another, albeit the first Devife be but Conditional. And therefore if a Man Devife his Land to A. B. in Fee, fo that he pay 100 l. to C. D. And if he fail, that then it fhall remain to G. D. and his Heirs; this Remainder to C. D. is void; for upon the Failure of Payment by A. B. the faid C. D. may not enter, and have the Land, but the Devifors next Heir. Likewise if Land be Devifed to F. G. and his Heirs, and if he die with-

out

out Heirs, that then it shall remain to I. M. and his Heirs, this is a void remainder.

15. A Man may Devise a Term of Years by way of Remainder, and the first Devisee cannot hinder the second of the Remnant of the Term. (t) But yet a Man possessed of a Term of Years cannot Entail it by his Will: And therefore if a Man Devise his Term to A. B. and his Heirs, or to him and the Heirs of his Body, or to him and his Issue, the Remainder to B. C. this Remainder is void, and the Devise is good for the whole Term of Years to A. B. and his Executors. (u)

t) Co. 8. 95.
Flo. 519. 546.
516. 539. &
Dyer. 277.
u) Co. 10. 87.
47. Pasch. 17.
Jac. B. R. Child
vers. Baily.

16. A Man Seised of Two Acres in several Towns in one County (that is) of the one for life, and of the other in Fee; and maketh a Feoffment by Deed of all his Lands in the same County, and makes Livery in the Acre in Fee in the name of both; the Lessor (notwithstanding this) may Devise the Reversion of the Acre for life. (w)

w) Dyer. Read.
in Stat. Wills.
Sec. 8. §. 19.

17. If a Man grants a Rent-charge out of Lands devisable to one for life, the Remainder over to the Grantor and his right Heirs, and after the Grantor Devise the Land to a Stranger in Fee and die, the Heir of the Devisor may Devise the Remainder of the Rent in Fee. (x)

x) Ibid. §. 21.

18. A Lease for Term of 100. Years is made to a Bishop and his Successors; he maketh a Lease for life, Rendring Rent to him and his Successors, and after he Devise the Reversion with the Rent in Fee; this is a good Devise for the Reversion, but not for the Rent. (y)

y) Ibid. §. 26.

19. If a Man having Two Sons and a Daughter Devise his Land to his Wife for Seven Years, the Remainder to his Younger Son and his Heirs, and if either of the said Two Sons die without Issue of their Bodies, the Remainder to the Daughter and her Heirs, and the Younger Son die in the life Time of the Father, and after the Father die; in this case and by this Devise the Daughter hath a good Remainder; but it seems the Elder Son hath first an Estate Tail by the Intent of the Devisor. (z)

z) Dyer. 122.

20. If Land be Devised to A. for life, the Remainder to B. for life, the Remainder to I. S. in Fee, in this Case (if B. be a Person incapable of a Devise) then he in the Remainder in Fee shall take presently after the first Estate for life ended. And if the Devise be to a Person incapable for life, the Remainder to I. S. in Fee, then shall I. S. take presently. (a)

a) Perk. Sec. 576. 567.

21. If a Man Devise his Land to two persons by name, and the Heirs of either of their Two Bodies, and for default of such Issue the Remainder to the right Heirs of the Devisor; after the Devisors death one of the said Devisees dies without Issue, the other Devisee

Devisee hath Issue and dyeth. In this Case and by this Devise the issue of such surviving Devisee shall have a Moity and no more of the Land. (b)

b] Dyer. 316.

22. A Lease is made to I. S. for the Term of the life of I. N. the Remainder to the same I. N. for Term of life of the said I. S. — I. N. in Remainder releaseth all his right to the said I. S. and dyeth. In this Case the Lessor may Devise the Reversion. And if a Man who hath a Reversion Devise this Reversion by the name of all his Inheritance or Hereditaments in D. it is a good Devise. (c)

c] Dyer. in St. Wills. Sect. 8.
§ 35. 36.

23. If a Man having Issue Three Sons, A. B. and C. doth Devise his Land to C. the Remainder to the next of Blood to the Testator: In this Case and by this Devise A. shall have the Land after the death of C. as the next of Blood. Likewise if a Man having Four Daughters, Devise his Land to the Youngest in Tail, the Remainder to the next of Blood; by this Devise the Eldest Daughter, and not all the rest shall have the Land after the Estate Tail. Also if a Man hath Two Sons and a Daughter, who hath Two Daughters, Devise his Land to a Stranger for life, the Remainder to his second Son for life, the Remainder in Fee to the next of Blood to his Son; in this Case if the Eldest Son die without Issue, the Daughter and her Daughters shall have the Land. (d)

d] Firzh. Devise 9. Perk. Sect. 508.

24. If Land be Devised to A. for life, the Remainder to B. and the Heirs of his Body, the Remainder to C. D. and his Wife, and after to their Children; by this Devise C. D. and his Wife have Estates for their Lives only, and their Children after them Estates for their Lives Joyntly. And albeit they have no Children at the Time, yet every Child they shall have after may take by way of Remainder. (e)

e] Co. sup. Lit. 9. Broo. tit. Tail. 21. & Co. sup. Lit. 20. 6. 16.

If one Devise his Land in this manner, viz. I give my Land to A. in Fee-simple, after his decease to B. his Son, who is his Heir apparent. By this Devise A. hath an Estate for life first, the Remainder to his Son for his life, the Remainder to the Heir of A. in Fee-simple. (f)

f] Dyer. 357. Paich. 44. Eliz. B. R. Pays case. Cro. par. 3.

One Devised his Land to I. S. from *Michaelmas* following for five Years, Remainder after the Plaintiff and his Heirs: He dyed before *Michaelmas*. The Question was, Whether this were a good Remainder? Because it could not enure instantly by his death; for it may not begin until the particular Estate, which was not to begin till after *Michaelmas*, and a Freehold cannot be in Expectancy. But all the Court held, That it very well might Expect; For in Case of a Devise, the Freehold in the mean Time shall descend to the Heir, and vest in him. Wherefore without Argument it was Adjudged accordingly, and that the Remainder was good.

Mich. 5. Jac. B.
per. Cur. Roll.
Abr. tit. Dev.
Co. 10. Lawpet
47. b. Mich. 13.
Jac. B. R. per
Dodridge Roll.
ibid.

27. Aff. 50. Cu-
ria. Roll. Abr.
tit. Devise.
lit. F.

If one Devise a Personal Chattel to one for life, the Remainder over to another, it is a void Remainder.

If a Man Devise a Term to one for life, the Remainder to another for life, with divers Remainders over: The Executors Consent to the first Devisee, will be a Consent as to all the other Remainders. Or in Case a Man Devise a Term to one, and a Rent thence issuing to another, and dies, the Executors Consent to the Devise of the Term, is an Assent also as to the Rent.

If an Estate be given to the Husband and Wife, and the Heirs of their Two Bodies, the Remainder to the right Heirs of the Husband, he may Devise that Remainder to his Wife.

C H A P. XIV.

Touching Devises of Lands with Limitations, and upon Condition.

1. The Condition of a Devise of Land not written in the Testators Life Time, makes the whole Devise as void, as if the Devise it self had not been written.
2. A Fee-simple of Remainder upon Condition by way of Devise.
3. In what Case the Executors of a substituted Devisee cannot claim the Lands Devised under Limitations.
4. A Condition or Limitation may not continue a Devised Estate for part, and defeat it for the residue.
5. In what Case the word [Paying] shall be construed only as a Limitation, and not as a Condition.
6. Not be in Remainder, but the Heir, shall take the advantage of a Condition broken, annexed to a Devise of Lands.
7. A Condition or Proviso contrary to Law is a void Condition.
8. The Heir may enter upon a breach of Condition, notwithstanding a failure of somewhat that ought to have been done by a Third Person.
9. The Heir may not enter, where it is but a Limitation and not a Condition.
10. If the Condition be, That a Lessee shall not Demise the Premises for above one Year, and he Devise the Premises, it is a breach of the Condition.
11. Lands Devised upon Condition of superstitious Uses, are vested in the Crown.

IF a Man give order for the writing a Devise of his Land to A. B. upon Condition; and the Devise to him be accordingly written, but the Testator dyeth before the writing of the Condi-

Condition; in this Case the whole Devise to A. B. is void. (a) a] Brownl. Rep. 1. part 44.
 And as in the case of Goods and Chattels conditionally bequeathed, the Executor shall keep the Thing until the Condition be performed, and after the Condition broken shall take advantage thereof: So in Case of Lands Conditionally devised to one and his Heirs for ever, or for life, the Heir of the Devisor shall keep the Land till the contingent Condition happen to take effect.

2. If one Devise Land of the value of 100 l. *per annum* to A. for life, the Remainder to B. paying 50 l. to C. by this Devise B. shall have the Fee-simple of the Remainder upon Condition.

3. If one Devise his Land to his Wife for her life, and if she live till his Son come to the Age of 25. Years, that then he shall have the Land; and if she die before he comes to that Age, that then A. B. shall have it till his Son come to that Age. A. B. dies before the Wife, and after she dies before the Son comes to the Age of 25. Years. In this Case the Executors of A. B. shall not have the Land till the Son comes to the Age of 25. Years. (b) b] Goldsb. 64. Plow. 2.

4. A. Seised of Lands in Fee, had Issue Six Sons and one Daughter, and Devised the said Lands to I. S. for 90. Years, if the said I. S. and G. his Wife, or any of them should so long live, the Remainder to P. his Eldest Son, and the Heirs Male of his Body, the Remainder to these other Sons, the Remainder to his Daughter. Provided that if the said P. his Son, or any of the Sons of the said Devisor, or any of the Heirs Males of their Body, should endeavour by any Act to Alien, Bargain, or Discontinue, then after such Attempt or Endeavour, and before any such Bargain, Sale, &c. were Executed, that the Estate of such person attempting, &c. should cease, as if he were naturally dead; and that then the Premises should descend, remain, and come to such person to whom the same ought to come, remain, and be, by the intent and meaning of his Will, and dyed. P. Levied a Fine of the Lands, he in the next Remainder entered, and claimed the Reversion by force of the Devise. It was Adjudged in this Case, That the Conuzee had the Reversion in him, and might maintain an Action of waste, because the Proviso of Restraint in the Will of A. was void and repugnant to Law; and a Proviso, Condition or Limitation ought to defeat the whole Estate; and it cannot continue it for part, and defeat it for the Residue. (c) c] Will. 37. Eli. in C. B. Rot. 1758. Termyn & Arscott's case.

5. A Copy-holder of Lands in Borough-English having Three Sons and one Daughter, Deviseeth his Lands to his Eldest Son, paying to his Daughter and every one of his other Sons Five Pounds within Two Years, and surrendered to the use of his Will. The Eldest Son was admitted, and did not pay the Five Pounds within Two Years. In this Case it was Resolved, (1) That al-

though the yearly Profits of the Lands for Two Year did exceed the Money to be paid, yet the Eldest Son had a Fee-simple. (2) Although this word [Paying] in the Case of a Will makes a Condition; yet in this Case the Law shall Construe this unapt word [Paying] a Limitation. For if it should be a Condition, the same should descend to the Eldest Son, and then it should be at his pleasure, whether the Daughter or Brothers should be paid or not; and therefore in this Case the Law should judg. the same a Limitation, of which the youngest Son should take advantage. (d)

d] 33. Eliz. in
B. R. *Wollock
& Hammonds*
case. vid. Co. 6.
part. *Collyers*
case. acc.

6. A Man Devis'd Lands to his Wife, upon Condition that she should bring up his Son at School, &c. and that after the death of his Wife, the Land should remain to his second Son in Fee, and dyed. The Wife entered, the Condition was broken; the Eldest Son after his full Age entered for the Condition broken; in this Case it was held, (1) That a Condition might be annexed to a will by the Stat. of 32. H. 8. of Wills, which gives liberty to a Man to Devise for the advancement of his Wife, &c. (2) That a particular Estate may be upon Condition, though the Remainder be without Condition. (3) That he in the Remainder should not take advantage of the Condition, but the Heir, because he is prejudiced in the Inheritance by the Devise.

e] Hill. 3. Mar.
Dyer. 127.
Warrins case.

7. If a Man make Two Men his Executors, Proviso, that one of them shall not Administer his Goods; the Proviso is void, because it restrains the Authority which was given by the first part of the will, and agrees not with the Law; for by Law every Executor may Administer the Goods: And such was the Opinion of *Baldwin* and *Eggesfield*. (f) But *Fitzh.* conceived the Proviso to be good, for that he might bring an Action, although he did not Administer.

f] Trin. 19. H.
4. Dyer. 4.

8. A Man Scised of Tenements in *London*, Devis'd the same to Two Persons, upon Condition that they should pay to his Wife 10 *l. per annum* issuing out of the said Tenements, at Two Feasts; and if the Rent be behind by the space of Six Weeks being demanded, that it should be lawful for the Wife to distrain. It was held a good Condition; and that if the Rent be behind, yet the Wife cannot distrain before a demand of the Rent; but the Heir of the Husband might enter for the Condition broken, though the Wife did not demand the Rent. (g)

g] Hill. 18. El.
Dyer. 348.

A Man Devis'd his Land to his Younger Son, when he should accomplish the Age of 24. Years, upon Condition that he should pay 20 *l.* to the Daughter of the Devisor, and if he shall die before the Age of 24. Years, then his Eldest Son shall have the Land upon Condition that he pay the said 20 *l.* and if both his Sons failed, that the Land should remain to his Daughter, and dyed.

The

The Younger Son entered after 24. Years of Age, and did not pay the 20 l. to the Daughters; the Eldest Brother entered upon him. It was Resolved by the Court in this Case, That the same was a Limitation and not a Condition, and therefore the entry of the Elder Brother was not lawful. (b)

b] Hill. 43. Eliz. in B.R. *Wife-man & Baldwins case.* Goldesb. 152, 153.

10. A Man made a Lease for Years, upon Condition, That if the Lessee shall Demise the Premises, or any part of it, other than for one Year, to any person or persons, then the Lessor and his Heirs to re-enter; the Lessee afterwards Devised it by his Will to his Son. It was held by the Court, That it was a breach of the Condition. (i)

i] 31. H. 8. Dyer. 45. Hill. 36. Eliz. in B. R. *Cole & Tauntons case.* Goldesb. 184.

11. If Lands be Devised upon Condition of superstitious Uses, as to find a Chaplain to say Mass; or the like superstitious Uses mentioned in the Will, the Remainder over for the like Uses, and if they in Remainder perform not the Condition, then to forfeit their Estate, and the Lands to remain to the right Heirs of the Devisor. In this Case it was held, That although the Land was Devised but Conditionally to find a Priest to say Mass, yet that it was within the Stat. of 1. Ed. 6. Cap. 13, whereby the Lands were vested in the Crown, because the said Uses were superstitious Uses, to which the Condition of the Devised Lands did refer. (k)

k] Hill. 45. Eliz. in C. B. Co. 1. part. *Adams & Lamberts case.* Pasch. 17. Eliz. *Hubbard & Spencers case.* C. B. Anderl. case 126.

F. C. Seised of the Mannor of S. made his Testament in writing, and Devised the Mannor to his Wife for the Term of 30. Years in these words, *viz. For and to these Intent and Purposes following, viz. I will, and my mind and intent is, That B. my Wife shall yearly Content and Pay out of the Issues and Profits of the said Mannor to Sir A. I. and others 30 l.* And further Wills, That the other Legacies given in his Will should be paid by her, and therein Devised divers Legacies. And further Willed, That his Wife should be bound to Sir A. and others for the performance of his Will. F. C. the Devisor dies, the Wife enters on the Land, &c. takes the Profits, and thereof pays the Legacies, but not to Sir A. and others, &c. Whereupon the Heir Enters as for breach of Condition. It was held by the Justices, that it was no Condition, but a Declaration of the Testators intention; for to what end or purpose should the Wife be bound, if it were a Condition. But Judgment was not given in the Case, for the Parties agreed.

CHAP. XV.

Touching Devises of Rents.

1. Rents Issuing out of Lands, are as Devisable as the Land is self, so as it be the Testators own Land.
2. A Grantee may not Devise the Rent, which he hath only for another Mans Life.
3. Rent to be Issuing out of a Common, is not Devisable.
4. Several ways how Rents may be Devised.
5. The Devise of the Reversion of a Rent upon a false suggestion, is a void Devise.

1. **A** Seigniorie, Rent, or the like, is Devisable as Land is, and will pass without the Attornment of the Tenant. (a) So that a Man may Devise a Rent *de novo* issuing out of Land, or a Rent issuing out of Land that is *in esse* before. And therefore if one make a Lease for Life or Years, Rendring Rent, the Lessor may Devise this Rent. Likewise if a Rent be granted to one and his Heirs, the Grantee may Devise this Rent. Also a Man that is Seised of Land in Fee, may Devise any Rent out of it at his pleasure. But a Man cannot Devise a Rent out of another Mans Land that is none of his own, nor out of that which he hath not; and therefore if one Devise Twenty Pounds to be issuing out of his Mannor of Dale, when in Truth he hath no such Mannor; that Devise is void.

2. If Rent be granted to one Man for the life of another, it seems the Grantee may not Devise this Rent, but that on failure of other disposal thereof in the Grantees life Time the Terre-tenant shall hold it as an Occupant. (b) And if one Devise a Rent of any certain Sum out of his Land to be paid quarterly, and say not how long the Rent shall continue, this is but an Fitate for life of that Rent. (c)

3. If a Man Seised of a Common, granteth a Rent out of the Land, although that the Land be Devisable, yet the Grant is void, and by Consequence the Devise. (d)

4. If a Tenant for life make a Lease for Years, Rendring Rent, and after the Tenant for life Surrender to the Lessor all his Right, and then the Lessor Devise this Rent, this is a good Devise during the life of the Lessee for life. Or if a Man make a Lease for life, Reserving Rent to him and his Heirs, and the Lessor Devise this Rent; this also is a good Devise of the Rent; otherwise it is, if he Reserve the Rent to him and his Assigns.

Or

a] Perk. Sect.
538. Lit. Sect.
585, 586. Dyer
253, 140. Fitz.
N. B. 121. Co.
sup. Lit. III. 8.
83. 3. 33. Brow.
1. part. 75, 76.

b] Dyer. 253.

c] Co. sup. Lit.
147. 8. 85. Ero.
2. part. 74, 75.

d] Dyer in Sr.
Willr. Sect. 4.
§. 15.

Or if a Lessee for Term of Ten Years, make a Lease over for Term of 40. Years, and the Lessor confirm the Estate, Reserving a Rent to him and his Heirs, and after by his Will Devise the Rent in Fee; this also is a good Devise of the Rent after the Ten Years, but not before. (e)

1) Dyer. ibid.
sect. 8. §. 29.
34. 37.

5. A Man Seised of a Rent, makes a Deed reciting that whereas I. S. holdeth the said Rent of his Grant for Term of life, he grants the Reversion of the said Rent after the decease of I. S. to the Grantee and his Heirs in Fee; and in Truth I. S. had nothing in the Rent; the Grantee Deviseeth this Rent; this is no good Devise of the Rent. (f) If the Husband make a Lease for life to the Daughter and Heir apparent of his Wife being Covert, Rendering Rent, and the Wife Mother die, and the Husband Devise the Rent; this is a void Devise of that Rent. (g)

1) Ibid. §. 8.

In an Action of the Case upon *Trover*, the Defendant justified and pleaded Rent granted to A. his Executors and Assigns for the life of B. out of *Black-acre*, and shewed that A. was dead, and that he as Administrator to A. distrained for the Rent on *Black-acre* in Arrears after the death of A. and that he is to have it during the life of B. It was Adjudged, That the justification was not good either for matter or manner; for that after the death of A. the Rent determined, and cannot come to his Executors or Administrators; for it was not a Thing Testamentary, but a Frank-tenement, and nothing in the Grant to A. and his Heirs for the others life.

2) Ibid. §. 32.
Mich. 44. & 45.
Eliz. B. R.
Salters case.
Tilv. Rep.

If Rent be granted out of Land Devisable by Custom; the Rent may be Devised within the Custom, for it is of the same nature with the Land.

22. Aff. 78. Ad-
judg'd. Perk. 8.
135. Roll. Abr.
tit. Devise; E.

C H A P. XVI.

Of Devises touching the Sale of Land by Executors or others.

1. The mean Profits of Lands Devised to be sold, are not Assets in the Executors hands, unless the Testator shall specially so Appoint it.
2. The Heir, and not a stranger though appointed in the Devise, shall take the advantage of a Breach of Condition annexed to a Devise touching sale of Lands.
3. Where the Executors have only an Authority, and not an Interest in the Lands Devised to be sold, the Heir of the Devisor shall have the mean Profits thereof till it be sold.
4. Otherwise, where the Executors have an Interest, in which case the Money or Proceed upon the sale, but not the mean Profits, shall be Assets in their hands.
5. Several Devises touching sales of Land, with or without the Assent of another.
6. By the word [Appurtenances] shall pass in a Devise Lands commonly used with a Messuage.
7. A Copy-holders Case of Devise of Land to his Wife.
8. Where one, who hath but an Estate for life, and no Interest to sell, may yet have an Authority to Appoint who shall sell the Lands Devised.
9. In what Case relating to this matter a Prohibition may Lye, or not.
10. A Case of Law, wherein one Executor alone (where there are two) can not sell the Land Devised.
11. How a sale of Lands Devised to be sold, may be void for want of sufficient Authority.
12. In what case a Sale of Lands Devised to be sold, may be made by one Executor, where there are two Appointed by Name.
13. Where there is an Interest as well as an Authority and Trust, the Executor of the surviving Executor may sell the Lands of the first Testator Devised to be sold.
14. Executors, who Refuse to Administer the Goods, may yet sell the Testators Lands, Devised to be sold.
15. Lands Devised to be sold by Executors, the one Refusing, the other may sell, but not to the Refuser.
16. A Sale by some only of the Executors is void, where there is a special and Joyn-Trust.

17. *The Difference between an Authority, and an Interest in Executors in point of Sale.*

1. **I**N all Cases of Devises of Land to Executors to sell the same, it is most Prudential to make it as clear and certain as may be (that is) That the Executors or the Survivor of them, or such or so many of them as take upon them the Probat of the Will (if his intent be so) shall sell it. (a) And it is safer to give only an Authority than an Estate: unless his meaning be that they shall take the Profits of the Land until the sale; And if he do so, then it is Requisite that he Appoint that the mean Profits until the Sale shall be Assets in their hands; for otherwise it shall not be so. (b)

a] Co. sup. Lit. 112. 113.

b] Browne r.

2. If one Devise Land to others to the intent that with the Profits thereof they shall Educate Children, or pay such Sums of Money or the like. In this case the Devisees must do accordingly, or they may be compelled thereunto. (c) And Regularly the Heir, and not a Stranger, shall take the Advantage of a Breach of a Condition annexed to Devises touching sale of Lands. And therefore if one Devise Land to another and his Heirs, Provided that he pay 100*l.* to A. B. Otherwise that the Land shall remain to C. D. and his Heirs; in this case, if the Devisee do not pay the Money, C. D. shall not take Advantage of it, nor have the Land according to the Devise, but the Heir of the Devisor shall enter, and have it, and Eject the Devisee. (d)

part. 34. 2. pt. 47. 100.

c] Co. 6. 16.

d] Dyer. 33.

3. If the Testator intending to have his Land or part thereof sold, for the payment of Debts or Legacies, doth Devise the same in this manner, viz. I will that my Executors, or that A. B. and C. my Executors shall sell my Land. (e) In this case the Executors have only an Authority and no Interest, For which reason the Land in the mean time Descends to the Heir of the Devisor, who shall enjoy the Profits thereof until it be sold; In which case also the Executors may sell it when they please, unless they be hastned thereto by order of Court; And are all to joyn in the Sale; Inasmuch that if one or more of them dye before the Sale, the surviving Executors, or the Executors of the deceased Executors may not sell it by this Authority. The Case is the same if any of the Executors Refuse the charge of the Will; in which Case the rest of the Executors which accept the said charge, may not alone sell the Land, unless the words in the Will be, That his Executors or some of them shall sell it: But now by the Stat. of 21. H. 8. cap. 4. Some of them may sell it without the rest, in case any of the Executors dye before the Sale.

348. 126. 128.

e] Co. sup. Lit. 236. 112, 113. 15. H. 7. 12. Dyer. 177. 219. Kelw. 40. 45. and 107, 108. Perk. §. 542, 543. Lit. Broo. §. 371. Vid. sup. in pt. 2. cap. 27.

4. But if the Testator Devise the Land in this manner, viz. I give my Land to my Executors to be sold, &c. In this case

the Executors have as well an Interest in the Land, as an Authority to sell it; And therefore it doth not here descend unto the Heiras in the former case, but the Executors shall keep it till the Sale, and may sell it when they will; so as it be within any competent or convenient time; for otherwise the Heir may Enter and Eject them, by a Condition in Law annexed to the Interest. And in this case the mean Profits until the Sale is no Assets; but the Money or Proceed upon the Sale shall be Assets in their hands. And in this case, if before the Sale one or more of the Executors dye or refuse, the rest may sell it, for the Estate surviveth; But it is supposed they may not sell to him that doth refuse the charge of the Will; Neither may they in either of these Cases transfer their power of selling to any other, nor keep the Land themselves, though they pay the value thereof with their own Money.

5. If the Devise be, that the Executors shall sell with the Assent of *A. B.* in this case if *A. B.* dye before he Assent, the Executors can not sell; and in his life-time they can not sell, without his Assent. (*f*) And if one Devise that his Lands shall be sold to pay his Debts, and say not by whom, in this case it shall be sold by his Executors; Or if one Devise all his Land except Ten Acres, which he doth appoint to pay his Debts; by this Devise his Executors or the survivor of them, may sell the said Ten Acres. But if one say by his Will that *A. B.* shall have as well the Guardianship and Education of his Children, as the disposing, letting, and letting of his Lands; in this case *A. B.* hath not power to sell the Land. (*g*) Or if one Devise that his Land shall be sold after his Wife's death by his Executors with the Assent of *A. B.* And make his Wife and another his Executors, and dye, and after *A. B.* dye; In this case the Land can not be sold, for the Authority is determined. (*b*)
- f*] Brownl. 2.
Rep. 100.
- g*] Perk §. 547.
Dyer. 371. 26.
- h*] Dyer. 219.

6. Suppose a man seised in Fee of a Messuage, with which certain Lands have been occupied time out of mind, give his Instructions for the making of his Will; & *inter alia* declares, That his meaning is, that his said Messuage and all his Lands in *W.* shall be sold by his Executors; And the party that writes his Will, Pens it in this manner, *viz. I will that my house with all the Appurtenances shall be sold by my Executors*; the Devisor dyes, The Executors sell part of the Lands: By this Devise such Sale is good, and the Lands do pass; for the words [*with all the Appurtenances*] are effectual to enforce the Devise, and extend to all the Lands; specially because the Devisor gave Instructions accordingly. (*i*)

7. A Copy-holder, Devise that his Land to his Wife for her life, and that after his death, the Wife or her Executors should sell the Land,
- i*] Hill, 28. Eliz.
B. R. Higham
& Harwood's
case. Leon.
Rep. 34. vid.
3. Eliz. Plow.
Com. 210. Sanders and Freymans case.

Land, and Surrendered to the use of his Will, which was Entered thus, viz. To the use of his Wife for life, *Secundum formam ultimæ voluntatis*. In this Case she hath an Estate in the Land to her own use for her life, and also an Estate in Fee to sell it; otherwise the clause (*secundum formam ultimæ voluntatis*) should be void. (k)

(k) Mich. 29.
Eliz. B. R.
Godbolt. 46.

8. A man Deviseeth by his Will his Lands to his Wife, and if she have Issue by the Devisor, that his Issue shall have it at his age of 21 years, and if the Issue dye before that age, or before his Wife, or if she have no Issue, that then she shall choose two Attorneys, and she to make a Bill of Sale of any Lands to her best Advantage. In this case she hath those Lands for life, and she having no Issue, hath not any Interest to dispose, but hath an Authority to nominate two who shall dispose of the Lands, and they may make Sale thereof. (l)

(l) Mich. 4. Jac.
B. R. *Beale and
Shepheard's
case.* Cro. 2.
part. 199.

9. A man did Devise his Lands which were held in Socage to be sold by his Executors, and that the Money thereof coming should be disposed of in payment of special Legacies which he Appointed by his said Will; the Executors sold the Lands. One of the Legatees (after the Will was Proved) sued the Executors in the Ecclesiastical Court for his Legacy; whereupon, a Prohibition was prayed: It was resolved in that Case. (1) That the Money was Assets in the Executors hands. (2) That there was no Remedy for it but by Suit in the Ecclesiastical Court, and therefore a Prohibition did not lye in the Case. (m) But Querie of the second payment; for it was held by all the Justices of both Benches (n) Where a man Deviseeth that his Executors shall sell Lands, and of the Money coming shall give such a Portion to his Daughter, That this was not a Legacy because going out of Lands, and that Suit did not lye for it in the Ecclesiastical Court; But an Accompt lyes at Law for the Money; And therefore in that case a Prohibition was granted to stay the Suit in the Ecclesiastical Court. (o)

(m) Trin. 9.
Eliz. Dyer. 264.
(n) Mich. 4. &c
Mary. Dyer.
152.

(o) Dyer. 151;
152.

10. A Devise was made to A. B. for life, the Remainder to C. D. in tayle, and if C. D. dye without Issue of his body, that then the Land shall be sold by his Executors; he maketh two Executors and dyeth; A. B. dyeth; C. D. dyeth without Issue of his body; In this case it seemeth that one of these Executors alone can not sell the Lands. (p)

(p) Goldesb. 2.
pl. 4.

11. A man Devised his Lands to his Wife for term of her life, the Remainder to D. his Daughter in tayle, and if she dyed without Issue, that then after the death of his Wife, the Lands should be sold for the best value by his Executors with the Assent of A. and B. And made his Wife and a Stranger his Executors, and dyed; the Wife Entered and dyed; A. and B. dyed; and the

Executor who survived sold the Land alone : The Opinion of the Court was, That the Sale was not good, because he wanted sufficient Authority. (q)

q) Michal. 5.
Eliz. Dyer.
219.

12. A man seised of divers Mannors and Lands, Devised all the said Mannors and Lands to his Sister and her Heirs for ever, *Except out of this General Grant my Mannor of R. which I do Appoint to pay my Debts*; and made two Executors by Name and dyed. One of the Executors dyed; the other took upon him the charge and Execution of the Will, and afterward sold the Mannor of R. for 300 l. for the purpose aforesaid, in Fee. It was the Opinion of the Court, that he might well sell it; for by the Circumstances it appeareth, That such was the Testators intent; and not to leave the Reversion to Discend to his Heir, but to trust his Executors with the Sale of it, for the payment of his Debts. (r)

r) Mich. 23.
Eliz. Dyer.
374.

13. A. made B. and C. his Executors, and by his Will appointed, that they should have and hold the Issues and Profits of his Lands, until his Heir should come to the age of 21 years, to the intent that the Executors with the Profits thereof, should pay his Debts and Legacies, and bring up his Children. One of the Executors dyed, the surviving Executor made his Executor, and dyed also the Heir being within age. It was the Opinion of the Court in this case, that the Executor of the survivor might receive the profits of the Lands, and dispose of them during the Non-age of the Heir, because it was an Interest in the Executors, and not an Authority or a Trust only. (s)

s) Hill. 2 Eliz.
Dyer. 210.

14. If a man hath Feoffees, and makes his Will That his Executors shall alien his Land; if the Executors Refuse the Administration of his Goods, yet they may sell the Lands, because the Will is not of a thing Testamentary; But the Executors have not a power to meddle with the Land, unless such a special power be given to them. If a man makes his Will of his Lands, and that his Executors (without naming them by their proper Names) shall sell them, if they refuse to be Executors, yet they may sell the Land: But if a man makes his Will, that his Lands which his Feoffees have, shall be sold, and doth not say, by whom, the Executors shall sell the same, and not his Feoffees; because the Moneys which come by the Sale, shall be Assets in the hands of the Executors; which is a proof that they may sell them: And if his Will be, That the Executors shall sell the Lands, before the Alienation the Heir may take and Receive the profits thereof; and if no Sale be made, the Heir shall hold the Land for ever. (t)

t) Mich. 15.
H. 7. 12.

15. A man Deviseth, That his Executors shall sell his Lands: Now by the Stat. of 21. H. 8. cap. 4. If the one refuseth, the other may

may sell the Lands; but the Sale can not be made to him who refuseth. (u)

16. A man made his Will, and made A. B. C. D. his Executors, and Devised his Lands to the said A. B. C. D. by their special Names, and to their Heirs; And further Devised, that the Devisees should sell the Lands to F. G. if he would give for it before such a day 100 l. and if he would not, that then they should sell it to any other, to the performance of his Will, viz. the payment of his Debts. F. G. would not give the 100 l. one of the Executors refused to intermeddle, the other three sold the Land; It was the Opinion of the Court, that the same being a special and a Joynt-Trust, that it could not survive, and that the Sale by the Three was void. (u)

17. By the Premises it is Evident, That if a man Willetth that his Executors shall sell his Lands for the payment of his Debts, and they all dye but one, and the survivor make the Sale, the Vendee shall not have the Land, and that the Law is otherwise, if the Lands were Devised to the Executors to be sold; The Reason is as aforesaid, because in the former case the Executors have only an Authority, in the other case they have an Interest. But if a man maketh two Executors, and willetth that they shall sell the Lands for the payment of his Debts; And they sell it only for term of life, the Remainder to one of themselves, and the Vendee dyeth; he in the Remainder may Enter. (x) *Sed Q.*

u) 27. Eliz. ist
Benloes case
Adjudged. vid.
Co. 1. part.
Instit. 113.

w) Mich. 29.
Eliz. B. R. Bon-
nifant and
Sir Richard
Greenfields
case. Godbolt.
77. vid. 26.
Eliz. B. R.

Vincent and
Lees case. in
Co. 1. part.
Instit. 113. acc.
These and other
cases relating
to this Subject,
are Reported in
Hughs Abridg-
ment. Tit. De-
vise.

x) Dyer. in
Stat. Wills.
Sect. 3. 5, 10, 11

C H A P. XVII.

Of Legacies and Devises in respect of Marriage.

As also

Between Husband and Wife.

1. A Condition of Marriage may be annexed to a Legacy; but an unlawful Condition thereof is void, and doth not prejudice the same.
2. A Condition of Marriage with the Consent of a Third person, doth oblige the Legatary to Marry, if he will have the Legacy; but doth not oblige him to have such Consent.
3. A Condition of Marriage with the Advice of another, obliges the Legatary to ask such Advice, if he will have the Legacy, but doth not oblige him to follow it.
4. If a Legatary be Married when a Legacy is given him on Condition of Marriage, it is Material to see whether the Testator knew so much, or not.
5. A Condition against Marriage is void, and the Legacy will be good notwithstanding.
6. If there be given to one, if he shall not Marry, a Legacy when he dyes; he shall have it presently and not wait for it till his death.
7. If 200 l. be given to one if she do not Marry, and 100 l. if she doth, and she after Marryeth; What shall the Legatary have.
8. What the Wife shall have (as to her Legacy) if she Marry after her election to the Contrary.
9. The Distinction which the Canon Law makes, in case of Conditions directly contrary to Marriage.
10. If the Husband doth Devise his House to his Wife quamdiu she shall continue a Widdow, and she live and dye such, it shall accrew by the Civil Law to her and her Heirs for ever.
11. A Legacy on a Marriage Condition, or made payable at a time to come, and the Legatary dye before the time come, whether and when due.
12. Difference between bequeathing a Legacy to one when he shall be of full age, and bequeathing it to him to be paid when he is of full age.
13. A Devise made by a Feme sole to him with whom she after Marries, is void.

14. *A Devise of Lands generally made by the Husband to the Wife for life, is no Bar to her Joynture, otherwise if Devised for her Joynture.*

15. *A Moiety of Goods Devised by the Husband to the Wife, is the Moiety of them as they were at his Death, if there be Assets enough for his Debts.*

1. IF a man bequeath 100 l. to A. B. Provided that he Marry with C. D. the Marriage must take effect with C. D. before the Legacy is due to A. B. unless there be an Illegality or too much Indignity in such Marriage; in which case the Condition is void in Law, and it shall not prejudice the Legatary. (a)

2. If I Bequeath 20 l. to E. F. so as she Marry with the good liking and Consent of A. B. she must Marry, otherwise she hath no right to the 20 l. (b) But she is not oblig'd to have the Consent of A. B. therein. (c) Yea, she shall have the Legacy though she Marry not only without his Consent, but also although A. B. be altogether unacquainted therewith, or knowing thereof should contradict it, (d) unless it be Appointed in the Will expressly, That in case she Marry without such Consent, the said Legacy of 20 l. shall be and enure to such or such pious uses specially mentioned in the said Will. (e)

3. If I Bequeath 100 l. to A. B. so as she Marry with the Advice of C. D. In this Case A. B. shall not have the said Legacy unless she require or desire the Advice of C. D. Albeit, she be not obliged to follow his Advice therein, yet she is obliged to ask his Advice, or she can not have the said Legacy. The reason of the Difference in this case from the former is, That in the former there may be a total impediment to Marriage it self, in This it is otherwise. (f) But if C. D. be Dead, whereby the Condition is rendred impossible, In such case it is as if it were performed, provided that C. D. were Dead before his Advice could well be ask'd or required.

4. If a man Bequeath 100 l. to C. D. in this manner, viz. I give and Bequeath 100 l. to C. D. if he shall Marry. And C. D. was a Married man at that time when the Testament was made. In this case it is Resolved, That if A. B. the Testator were at the time of making the Testament Ignorant of C. D's being then Married, the Legacy is instantly due to him upon the Testators death, because the Condition in a Legal Construction is actually performed; But if the Testator at the time of his making the Testament did infallibly know that C. D. was then Married, the said Legacy is not due to him until he be Married a second time. (g) which Distinction ought to fall under Consideration with those who hold, That if a Testator Bequeath 100 l. to C. D. towards

a] Mantic. de Conject. ult. vol. lib. 11. tit. 18. & l. Titio centum. §. 1. De Demonst. & Condit. & l. hæc Conditio. De Demon. & Condit.

b] Mantic. ibid. l. 72. §. Si arbitrata, ff. De Demon. & Cond.

d] Vsq. Con- trovers. l. 3. cap. 94. nu. 14. e] Mant. ubi Supra.

f] Mant. ibid. nu. 10. & Graf- sus. §. Lega- tum. q. 50. nu. 11.

g] l. Si jam fa- cta, ff. De Cond. & Demo- n. & Papo. Notar. l. lib. 9. tit. de Fidei comiss.

her

her Marriage, the Legacy may be due to her, albeit she were Married at that time when the Testament was made. (b)

b) Bald. ad L. ult. C. De Sentent. quæ. &c. i) Mant. lib. 11. tit. 19. & in l. hoc modo. de Cond. & Dem. k) Peregr. de Fidei commiss. art. 11. nu. 118.

5. If I bequeath 10 l. to one, provided she do not Marry, it is a void Proviso in Law, and she shall have the 10 l. although she do Marry. (i) Otherwise it is, if the words be, Provided she do not Marry at such a time, or in such a Place, or with such a Person. (k)

6. If a man Devise to A. B. in this manner, viz. *I give unto A. B. if she shall not Marry, my Mannor of D. when she dyes.* In this case A. B. although she Marry, shall have the Mannor presently, and not expect or wait for it until her death. The Reason is, because that Time of her death is not joyned with the Legacy, but with the Condition; as if the Testator had said, viz. *If A. B. shall remain unmarried to her death.* (l)

l) Cuiac. in l. intestato. §. Sed si. De suis & Legit.

7. Suppose a man doth bequeath 200 l. to A. B. if she do not Marry, and 100 if she do Marry; and after she Marryeth. Some are of Opinion that in this case A. B. shall have 300 l. viz. 100 l. because she is Married, and 200 l. because the Condition of non-marriage or against Marriage is void. Others are of opinion, that she can recover but one of the said Legacies, and that is the 200 l. (m)

m) l. Titia. ff. De Cond. & Demonst.

8. Suppose a man bequeath to his Wife the use and occupation of all his Goods, if after his decease she shall abide in her Widdowhood; But in case she Marry again, that then she shall have only 100 l. In this case, if at first the Wife's Election be to continue in her Widdowhood, she shall accordingly enjoy and have the use and occupation of the said goods; But if after that she Marry, she shall not have the said 100 l. (n) And some are of Opinion, That by such second Marriage, she forfeits both the said Legacies, because thereby she nulls her precedent Election whereby the was concluded, and therefore shall also restore or refund the value of the Interest of such Goods as she used and enjoy'd during her Widdowhood; and so it hath been Adjudg'd. (o)

n) Surdus. de Alimentis. tit. 9. quæst. 16. vers. Addo.

o) In Rot. Rom. dicit Matheac. de Legat. in lib. 1. cap. 4. nu. 17.

9. Although a Condition directly contrary to Marriage, annexed to a Legacy in a Will, is a void Condition for that very reason; yet the Civil or rather the Canon Law doth distinguish in this point between a Virgin and a Widdow, and says that such Conditions against Marriage (as to a Virgin) are void; but allows them as to Widdows. (p). Specially if the Legacy be given by a Husband to his own Wife, or by a Son to his Mother.

p) Mant. lib. 21. tit. 19. & Ranch. Decis. part. 1. Concl. 298. cum multis aliis.

10. A man bequeaths the House wherein he lives to A. B. his Wife, *quændiu* she shall continue a Widdow, and dyes; A. B. doth not Re-marry, but lives and dyes a Widdow. In this case the said House by the Civil Law comes to A. B. and his Heirs for ever.

over. (y) Note, that what in the premises hath been said touching the invalidity of Conditions against Marriage, annexed to Legacies in relation to Females holds the same in Law touching the like illegal Conditions in reference to Males or Masculines.

11. A man Deviseth to his Daughter 500 l. towards her Marriage. In this Case it was the Opinion of the Court, That if she die before Marriage, her Executors shall have it; But if the words were [To be paid at the day of her Marriage, or at the age of 21 years,] and she dyeth before both, it is otherwise. (z) The latter part of which Judgment seems not to agree with the Civil Law in that point, which sayes, the time of the age of a Legatary may be joyned either to the substance of the Legacy, or to the execution and performance of the same; if the time of the age of the Legatary be joyned to the substance of the Legacy, as *when the Testator doth give thee 100 l. when thou shalt be of the age of 21 years;* In this case if thou dyest before that time, thy Executors cannot recover the 100 l. But if the time of the age of the Legatary be joyned only to the execution or performance of the Legacy, as *when the Testator doth give thee 100 l. which he willeth shall be paid when thou accomplish the age of 21 years;* In this case, although thou dye before thou accomplish the age of 21 years, yet thy Executors or Administrators shall recover the same, when the time is accomplished, wherein thy self (if thou hadst been then living) mightst have recovered the same.

12. Consonant whereunto is that which we find Reported, viz. That it was agreed by the Court, That if a man Devise to his Daughter 100 l. when she shall be Married, or to his Son when he shall be of full age, and they dye before the time appointed, and make Executors, their Executors shall not have it. But it is otherwise, if the Devise were to them, to be paid at their full ages, and they dye before that time, and make Executors, there the Executors shall have it. (a) Which difference was since likewise so Agreed and Adjudged. (1)

13. A Feme Sole Deviseeth Lands to A. B. in Fee, to whom afterwards she was Married; and during the Coverture Countermands her Will, saying, her Husband should not have the Land, nor any other benefit by her Will, and dyes. In this case the Husband shall not have the Land, not only because of her Countermand, but because of the disability of a Feme Covert to make a Will, which takes no effect till the parties death. (u) And therefore if a Feme sole Deviseeth Lands to a man, and then takes him to Husband, and dyes: This Inter-marriage is a reversion of the Devise, and the Heir of the Woman shall have the Lands, and not the

L I

Husband,

De Praxis.
lib. 4. int. 1.
dub. 10. nu. 93.

PUGH. 37.
H. 8. Dyer. 55.
in the Lord La-
thams case. As
in Hughes
Abridg. tit.
Devise. Sect. 6.
S. 9.

1) Mich. 9.
Jac. in C. B.
adjudged acc.
2) Trin. 1659.
in B. R. in
Doomlow and
Shawes case.
Vid. 15 Car. in
R. R. & Hugh.
Abridg. tit.
Devise Sect. 7.
S. 14.
3) Mich. 31.
Eliz. in C. B.
Goldsb. 107.

Husband, because after Marriage the Will of the Wife, in Judgment of Law, is subject to the Will of her Husband, and a Feme Covert hath not any Will; for the making of the Will is but the Inception thereof, and takes no effect till the death of the Devisor. (n)

n) Co. 4. part.

61. Forfe and

Hemblings

case, and

Hugh, Abr.

tit. Devise.

Seft. 1. §. 52.

x) Co. 4. part.

4. in Vernon's

case.

14. If a man Devise Lands generally to his Wife for the Term of her life; It cannot be averred to be for the Joynture of the Wife, and in satisfaction of her Dower; But if a man Devise Lands to his Wife for life, or in tail, for her Joynture, and in satisfaction of her Dower, the same is a good Joynture within the Stat. of 27 H. 8. (x)

15. A man Devise the Moiety of his Goods to his Wife, and dyed. It was the opinion of the Court, That she should have the Moiety of them as they were at the time of his death, if his Executors had Assets sufficient to pay his Debts. (y)

y) 5. Mar.

Dyer. 164.

Vid. 38. H. 8.

Dyer. 59. Lord

Latimer's case.

adjudg.

Hill. 7. Jac. B.R.

in Starkey a-

gainst Barton

and Gores case.

Trin.

Brook. tin.

Devise. 18.

If a Legacy be given to a Woman Covert, and her Husband give a Release, and afterwards he and his Wife sue in the Ecclesiastical Court for the Legacy, the party sued shall not have a Prohibition upon the Husbands Release, because the Temporal Judges cannot meddle with a Legacy, nor consequently determine whether the Release will extinguish the same. As the Case 29 Eliz. Adjudged.

The Husband may Devise to his Wife although they are but one person in Law, for it takes no effect till after his Death.

C H A P. XVIII.

Of Legacies and Devices to a Child in the Womb.

1. A Devise to an Infant in the Womb is good.
2. It may be good, though the Infant be rip'd alive out of the Womb.
3. It is good, though it be a Devise in Remainder, or in Tail.
4. How the Divident of a Devise shall be in case of Twins, unexpected, or an Hermaphrodite.
5. How the Legacy shall be apportioned, when bequeathed to any Child in the Womb, and more then One or Two happen to be Born.
6. Where a Devise void or voidable in his Inception, may become good by matter ex post facto.

1. **T**hat a Child in the Womb, to whom a Legacy is bequeathed or Lands Divided, is after his or her Birth, though subsequent to the Testators death capable of taking by such Devise, is a Truth now not to be controverted though it hath been Contradicted and otherwise Resolved; for we find it Reported in a Case thus stated, viz. A Man had Issue Five Sons, his Wife being with Child with the Sixth at the time of his death; and by his last Will declared, That the Third Part of his Land should descend and come to his Son and Heir, the other Two Parts he bequeathed to his Four Younger Sons by Name, and to the Heirs Males of their Bodies; and if the Infant in the Mothers Womb be a Son, then he to have a Fifth Part, as Co-heir with his Four Elder Brothers. The Sixth Son was Born after the death of his Father; in this Case it was Resolved, That the Son Born after the death of the Father, should not have any thing, because he was incapable as a Purchasor, when the Devise was first to take effect, because he was not then *in esse* or *verum natura*. (a) Notwithstanding which, it was not long after in another Case otherwise understood, in which Case it was Admitted, That a Devise to an Infant in his Mothers Belly was good. (b) It is presumed, the intendment is of such an Infant as was born after the Testators death. In other Cases also it hath been held, That a Devise to an Infant in his Mothers Belly, is good. (c)

a) Mich. 14. El.
Dyer. 303. & in
Hugh. Abr. tit.
De. Sec. 8. §. 1.
b) Trin. 17. El.
Dyer. 342. &
Hugh. ibid. §. 2.
c) Farringdons
case. vid. Coker
7. part. 9. in the
Earls of Bedford's
case. & Hughes
ibid. §. 3.

d) Dyer. in St.
Wills. Sect. 3.
§. 3.

2. A Man Deviseeth his Land to his Wife being with Child, the Remainder to the Issue *en ventre sa femme*. his Wife in Travail dyeth, and the Son is rip'd from his Mother alive; he shall have the said Remainder. (d)

e) Hill. 13. Jac.
in B.R. Adjud.
Blandfords
case.

3. If one be possessed of a Term of Years of Land, and Devise the same to his Wife during all the Term, and if she die within the Years of the Term, then to A. and B. his Two Sons, if they have no Issue Male; but if they or either of them have Issue Male, then that it shall go the use of those Issues Male; the Wife dies, and the Two Sons dye without Issue Born, one of their Wives being privily with Child of a Son, who after his Fathers death is Born. In this Case and by this Devise the Issue Male shall have it as soon as he is Born. (e)

4. Suppose a Man possessed of an Estate to the value of 721 l. his Wife being with Child, did Devise in this manner, viz. Whereas my Wife is with Child, I Will that if she be delivered of a Son, that then that Son shall have 480 l. 13 s. 4 d. And my Wife shall have 240 l. 6 s. 8 d. But in Case she be delivered of a Daughter, then my Will is, That that Daughter shall have the 240 l. 6 s. 8 d. and my Wife shall have the 480 l. 13 s. 4 d. and dies. It happens, That the Wife is after delivered both of a Son and a Daughter. The Question is, How each Legatary shall be satisfied his and her Legacy according to the Intention of the Testator, for by the Will a Legacy is given to each of them: It is Resolved, That according to the Testators Intention, which is the Index of the Testament, the Son shall have double to the Wife, and the Wife double to the Daughter; and consequently the Son shall have 412 l. the Wife 206 l. and the Daughter 103 l. Which in all amounts to 721 l. the full value of the Testators said Estate. So that each person is to have a Portion answerable to the Rate of Proportion mentioned in the Will (f) But if the Child which the Mother brings forth be an Hermaphrodite, then it shall have the Portion due to that Sex whereof the Hermaphrodite doth most partipate. (g) But if that also be doubtful, it is to be presumed according to the more worthy Sex, viz. the Masculine. (h)

f) l. Instit. ff. de
liberis & Post-
hum. & Mant.
de Conject.
ul. Vol. lib. 4.
tit. 9. nu. 12.
g) l. quæritur.
ff. de Schom.
h) Addit. ad
Barr. in dict.
l. quæritur.

5. In Case a Testator saith, If my Wife bring forth any Child, I give to the same 100 l. and she bring forth Two or Three Children. In this Case every Child may obtain a Hundred Pounds, if there be Assets sufficient, and the Testators Goods will suffice to satisfie the same, otherwise there must be a proportionable deduction. (i)

i) l. qui filia-
tus. §. 1. ff.
de Legib. &
DD. ibid.

Others say, the Legacy must be divided among them. Mantie. Conject. ult. Vol. l. 4. tit. 8. n. 4. If he had said, I give to the Child in the womb 100 l.

6. There is a Case wherein by the Birth of a Child after his Father, the Testators death, a Devise becomes good to another, which otherwife would be void, when none is given to himself: As thus. If one Devise his Land to his Daughter and Heir apparent in Fee-simple, this Devise is void; yet if in this Case the Wife of the Devisor be privily with Child of a Son which is born after his death, now is the Devise become good, for now she is not Heir to her Father. (A) Q.

Mead and *Pyriam* Justices in the C. B. Affirmed, That it had been there Adjudged in the Lord *Dyers* Time, That if Lands are Devised to Two Men, and the Child wherewith the Devisors Wife then goeth, that such Devise is good, and the Child shall take by such Devise: But whether they shall take in Common or Joynt-tenancy the Lord *Dyer* doubted.

A. possessed of a Lease for Years Devised the same to his Eldest Son, and the Heirs of his Body; and if he dyed without Issue, then to P. his Younger Son, and the Heirs of his Body; and for default of such Issue, that the Term should remain to his Daughters. The Testator dies leaving Two Daughters, and afterwards another Daughter is Born. The Eldest Son Sells the Term, and dies without Issue; the Younger Son dies also without Issue; the Three Daughters enter, and the Term was Adjudged to them Three, although the Youngest Daughter was not Born at the Time of the death of the Devisor; otherwise if he had named the Two Daughters in the said Devise by their proper Names.

4 J. Fitz. tit.
Assize. 27. vid.
Shep. Epit.
verb. Testam.
cap. 155. d.
968.
Mic. 24. El. Mo.
Rep. nu. 412.

Mic. 27. & 28.
Ell. B. R. Stan-
ley ver. Baker.
Mo. Rep. nu.
358.

C H A P. XIX.

Certain Cases of Devises touching Lands and Chattels-real.

1. The difference in Power of Devising between him in Fee, and Tenant in Tail for Life.
2. What Uses are Devisable.
3. Money payable on a Mortgage is Devisable, though Devised before the day of Payment.
4. Obligations or Chattels-real in right of a Wife, as Executrix or not, are not Devisable by the Husband.
5. A void Presentation is not Devisable, in what kind an Advowson in Fee may be.

6. Whether

6. *Whether Leases and Rents may pass under the Notion of Immoveables, as also Bonds and Specialties under the Notion of Moveables.*
7. *What shall pass by a Devise of all Goods, Chattels, Moveables or Immoveables.*
8. *The difference between an universal Successor, and a naked Executor or particular Legatary.*
9. *Devise made under Coverture may be good by new Publication of the Husbands death, otherwise not.*
10. *The same Law as to a Devise made by an Infant during Minority disqualifies.*
11. *Not full Payment Equivalens to no Payment.*
12. *A Personal Charge incumbent on a Legacy, is to be defrayed by the Executor, not the Legatary.*
13. *Equity in Election to be Regulated by the Testators Intention.*
14. *Circumstances of a Devise not Restrictive, nor joyned to the Devise is self, ought not to minorate the same.*
15. *A Devise shall be interpreted to the utmost Consistency with the Devisors words to the best advantage of the Devisee.*
16. *Comprehensive words ought not to be extended beyond what is Rational in Construction of Law.*
17. *The Advantage of a Residuary-Legatary when others refuse.*
18. *Discrepancy among the DD. touching a Legacy to the Poor.*
19. *Accessory Advantages to a Legatary between the making the Testament and the Testators death.*
20. *The Devise of a Thing not in rerum natura at the Testators death, is void.*
21. *The Testators Estimation of a Legacy doth not alter the Condition thereof.*
22. *The Executor may not exceed his Testators Estimate to a Legataries prejudice.*
23. *The Devise of a part, not expressing what part, implies a Moiety.*
24. *Constructions of Law to avoid uncertainty; and the Law touching Elections.*
25. *Where a Legacy is given Nomine pœnæ, and failure in the Executor, the Legatary may take either, but not both Legacy and Penalty.*
26. *Where there happen Two Elections in one Devise, the Legatary shall have the first, the Executor the second.*
27. *The Law touching a Devise of a House, where the Testator had none, or many, or burnt, or ruin'd, or pull'd down, or demolish'd, or re-edified.*

28. In what Case a Billjoyning to a House, shall pass by a Devise of the House, or not.
29. One Thing ought not to be Compriz'd under the Appellation of another, beside the Testators Intention.
30. One Stable or one Kitchen to Two Houses, shall pass with that Devised House, whereto they are most nigh, or most Contiguous.
31. The Law touching the Devise of a House with all things therein.
32. The Difference between a Devise of a Chamber, and the Devise of a Shop.
33. The Devise of a Field carries also the Edifice erected thereupon.
34. The Civil Law where the Fee of Land is Devised to one, and the Rents of the same Land to another.
35. in what Case an error or mistake in the Testator may be a prejudice to the Legatee.
36. A Legacy or Devise may be infer'd as well from the Testators Intention as Expression.
37. A Devise by Reason of an Omission of that wherof the Testator said he would make a description, is not void.
38. A Legacy to Two, wherof one is noty accrews in the whole to the other that is.
39. Further Exemplifications of Law touching Devise of Houses, altered, burnt, and re-edified.
40. An Exception of a Thing which is not, is no prejudice to the Devisee.
41. The same thing Conditionally twice Devised by two Testators to several Persons, how or in what Case good to either or not.
42. By a Devise of ground doth pass the Edifice thereon, albeit it were erected after the Devise made.
43. How a Devise is to be apportioned, where the Devisees are joyned in the thing Devised, but disjoyned in the manner of Devising.
44. A Devise of Lands by a certain Name carries all of that Name, though otherwise distinct, unless the Testator intended otherwise.
45. Any words that do but plainly declare the Testators meaning, may serve for a Devise.
46. The Executor shall pay the Land-lords Rent for Ground in Lease, the Fruit or Proceed wherof is Devised to another for the Term.

47. *A mistake in the Testator only of the Situation of the Land Devised, shall not prejudice the Devise.*
 48. *The difference between necessary and voluntary Alienations, prohibited to Devises by a Testator.*
 49. *A Tripartite Case in point of Alienation prohibited by a Testator.*
 50. *How the disjunctive [Or] in Legacies and Devises, is frequently understood for the conjunctive [And;]*

a] Co. 4. 63.
 Perk. Sect. 512
 518. Co. 11.
Rich. Lijards
case. Kelway
 88. vid. *Læte-*
ra. l. si quis in-
quilinus. in
prin. de Leg.
1. & Pereg. de
fidei commiss.
art. u. nu. 105.
 b] Perk. Sect.
 500.

W Here a Man is Seised of a House in Fee, or of Land in Fee, and may devise such House or Land, in such case may Devise the Doors, Windows, Waincot, or the like Incidents of the House, also the Trees and Grass growing upon such Land. Otherwise it is with a Tenant in Tail for Life or Years in Houses or Land. (a)

2. If a man hath an Use that is not Executed by the Stat. of Uses, but remains at the Common Law, he may make a good Devise thereof. (b) And therefore if one possessed of a Term of years, grant it over to another to the use of the Grantor, he may Dispose this use by his Will, for it is in the Nature of a Chattel.

3. One that hath Money to be paid him on a Mortgage, may Devise this Money when it comes. If A. Enfeoffe B. of Land, upon Condition that if B. do not pay A. 100 l. such a day, that then A. may Re-enter. In this case A. may Devise this 100 l. if it be paid; and the Legacy is good, albeit it be made before the day of Payment comes.

4. A Man cannot Devise by his Will any Real Chattels that he hath only in right of his Wife; nor the Obligations that are made to her alone before or during the Coverture, nor the Chattels Real or Personal which she hath in right only of another as Executrix. But all her own proper Goods and Chattels Personal, and all Obligations made to them both during Coverture he may Devise by Testament. (c)

c] Perk. Sect.
 560. & Dr. &
 Stud. cap. 7.

5. A Bishop cannot by his Testament Devise the Presentation of a Church that became void in his time, yet if he or the Parson of a Church have the Advowson thereof in Fee, and Devise that Two or Three of his Executors shall present at the next Avoidance, this is a good Devise. (d)

d] Trin. 13.
 Jac. in B. R.

6. By a Devise of Immoveables (which are Chattels real) do pass Leases, Rents and the like; and by a Bequest of Moveables (which are Chattels Personal) will pass Bonds, and Specialties; but Debts pass not by either of these Devises. (e) By Immoveables are understood not only the foresaid Chattels real, but also in some sense Trees growing on the Ground, Fruit on the Trees, Terms of Years and the like; and by Moveables are

e] Agreed. Hil.
 9. Car. in C. B.

are Regularly understood all Goods both Actually Moving, and Passively Moveable.

7. If a Man Bequeath to A. B. all his Goods, he shall thereby have the Testators whole Estate (his Lands, Tenements) and Freehold excepted) and thereby the Debts and Money. (f) If he Bequeath to him all his Chattels, he shall have thereby all as in the former Case. If he Bequeath to him all his Moveables, he shall have all his Personal Goods, both quick and dead, and if he Bequeath to him all his Immoveables, he shall have all the Testators Leases, and all the Natural Fruits thereof, as Grass on the Ground, Fruit on the Trees, and the like; consequently Fishes in a Pond, Pidgeons in the Dovehouse, &c. as Appurtenances to the Ground Devise, as well as the Natural Fruits, or Grass growing on the same (g)

8. If a Man Devise all his Goods and Chattels to A. B. and die, and A. B. die also before he hath proved the Testators Will; in this Case the Administration of the Goods and Chattels of the said Testator shall be committed to the next of Kin of the said A. B. and not to the next of Kin of the said Testator, because in this Case A. B. was the universal Successor. (h)

9. If a Woman under Coverture Devise her Land, then publish and approve it after her Husbands death, when she is sole; by this means that Devise which was Originally void, is now become good: But if she make and publish it during the Coverture, albeit her Husband doth afterward die, and she become sole; yet this accident alone, without a new publication after her Husbands death, will not make that Devise good. The Law is the same as to Goods and Chattels. (i)

10. In like Manner if an Infant within Age as to Lands, or within Age as to Goods, Devise the one or Bequeath the other, and publish the Will; and after he come to full and competent Age publish and Approve it again: By this means the Devise or Legacy becomes good; otherwise it is, in Case he do not Publish and Approve it when he attains to Full and Competent Age. (k)

11. Suppose the Testator doth Devise in this manner, viz. I Will that my Executor shall pay 100 l. to A. B. by the Tenth day of March next after my decease; and if otherwise, then my Will is, That my Executor shall Surrender to him all the Right I have in a Lease of my Ground called Black-acre; and dies. The Executor doth not pay to A. B. above 90 l. by the day Appointed. In this Case A. B. restoring the said 90 l. to the Executor shall have the said Ground; and he may detain the Money till he recover the Land. (l)

[f] Gloss. in l. h. verb. ff. de her. red. inst. Bart. & Bald. ibid. & Staof. Pre. rog. c. 16. & Tyraq. de retr. art. Lign. §. 7. gloss. 7. nu. 18. & old. Conf. 209. [g] Kelway. Rep. fo. 118.

[h] Dyer. 371. nu. 8.

[i] Plow. 344.

[k] Plow. ibid.

[l] Galgan & de. Condit. in pr. 2. cap. 5. q. 15.

m) l. qui con-
cubinam §. qui
hortos. de Le-
gar. 3. & Pinell.
ad leg. 1. De.

Bon. max. par.
2. m. 32 & de
Pign. lib. 4.
l. 1. dub. 3.
nu. 14.

n) Charond.
Resp. lib. 4.
cap. 50. l. 1.

De Pign. lib. 4.
l. 1. dub. 3.
nu. 14.

o) l. 1. de Reb.
Dub. & l. ult.
De tritico, vi-
no, & oleo leg.

p) Sardi. Decif.
241.

q) l. quibus §. 1.
de Cond. &
Dem. & Pap.
Notar. l. tit. de
legat. ver. est
pertinente.

12. Suppose the Testator both Devise the Fruits of an Orchard or other Lands, which at a Rent certain he hath taken to Farm for Seven Years; who shall pay the said Rent, the Executor or the Legatary? It is Answered, That the Executor shall pay it, because it is a Personal Charge. (m) Or if he Devise certain Lands which he had lately bought, but the whole purchase-money not paid at the Testators death; the Executor, and not the Devisee is lyable for the same. (n) But the Devise shall not take effect till the same be paid, if there be no other Assets wherewith to pay it.

13. A Man possessed of Three Fields, whereof Two called *Rusberofis*, the one being of much better value then the other, the third called *Longlands*, doth Devise one of his *Rusberofis* or *Longlands*, which he will, to A. B. and dies. In this case A. B. hath his Election, whether he will have one of the *Rusberofis* or *Longlands*; but if he chuses one of the *Rusberofis*, it shall be that which is nearest in value to *Longlands*. (o)

14. A Man made his Willy and therein Devise to A. B. all the Lands which he had in the Tenure or Occupation of his Tenant C. D. Consisting of Meadow, Pasture, and Arable Grounds, Scituate about the Farm-house of the said C. D. and dies. The Question was, Whether other Pasture and Arable Grounds belonging to the Testator, in the Tenure or Occupation of the said C. D. and by him Rented of the said A. B. (but not Scituate as aforesaid) were to be Comprized within this Devise. In this Case it was Resolved in the Affirmative, The Reason is, because the quality or Circumstance of the Place or Scituation is not here joyned with the Devise for any Restrictions sake, but only by way of Demonstration. (p)

15. A Man bought certain Lands of A. B. with a Clause or Covenant of Redemption within a certain Time, in the Nature of a Mortgage. The Time of Redemption being Elapsed, the Purchaser made his Will, and therein ordered, That his Executor should Restore the said Lands to A. B. paying what Costs and Charges the Testator had been at, and Expended about the said Lands. The Question was, Whether the Mortgagor or Vendor, now the Legatary or Devisee were in this Case obliged to pay the Redemption-money over and above the said Costs and Charges which the Testator had Expended about the Lands as aforesaid. In this Case it is Resolved in the Negative, viz. That the Devisee shall have the Land paying only the said Charges, and without paying the Redemption-money. (q)

16. A. B. by his last Will and Testament makes his Two Sons C. D. and D. B. the Joynt-Executors of all his Estate, and dies. C. B. for a certain Sum of Money Sells his Part or Interest in the said Estate unto D. B. his Brother. After D. B. makes his will, and

and therein Devises to the said C. B. *all his Interest in the said Estate by his Father*, and dies. The Question was, Whether C. B. by that Devise should have all the said Estate whereof the Two Brothers were made Joynt-Executors by their Father, or only so much thereof as accrewed to D. B. by vertue of his Co-executorship. In this Case the D. D. are somewhat divided, but the prevailing Opinion is, That C. B. by this Devise shall have no more then accrewed to D. B. by vertue of his Co-executorship, because the other part of the Estate was his by Purchase, and not by being Executor to his Father; and the Property being altered by the Sale, it ceased to be the Fathers Estate, or any Estate to D. B. by the Father, and became his own proper Estate by Purchase. (r) But the Question is put a little further, as whether the said Devise shall be made good as the said part was when the Father dyed, or as it was at the time of D. B. the Testators death. In this it is Agreed, That the said Devise shall be considered only as the Estate was at the Time of the death of the Devisor D. B. and not as it was at the Time of the death of his Father. (s)

(r) Decij Conf. lib. 69. & Molin. ibid.

(s) Molin. add. Confil. 69.

17. A. B. being possessed of several Houses by Lease doth Devise Two of them in his last will and Testament unto C. D. such as he shall chuse; or Two of them to C. D. which he will, the rest to I. G. In this Case if C. D. refuse to take by this Devise, and will chuse neither of the said Houses, I. G. shall have them all. (t)

(t) cum optio, de option. Leg.

18. A. B. makes his Will, and thereof C. D. his Son the sole Executor; in which Will he appoints, that a Fourth part of his Estate shall be given to the Poor in Case C. B. die without Issue. C. B. Survives the Testator, hath a Son, makes his Will, and therein Ordains, That if his Son should happen to die Intestate and without Issue, that then the Contents of A. B. his Fathers Will should be performed, and dies, leaving Issue a Son: After the said Son of C. B. dies Intestate and without Issue. In this Case. In this Case some are of Opinion, That the said Fourth part of A. B. the first Testators Estate is not due to the Poor, because that general disposal which C. B. made in his Will, ought to be understood only of such Things as might be claimed by the first Will, and which could be due only by the same. (u)

(u) Alex. Conf. lib. 5. Conf. 81. & ibid. Molin.

Others conceive, That it is due to them, in Case there were no other Legacies contained in the Will of A. B. which his Son C. B. was to see performed and discharged.

19. If a Man doth Devise Land whereon is no House at the Time when the Testament was made, but One is built thereon before the Testator dies; in this Case the House as well as the Land shall pass by this Devise. (w) Likewise if a Testator De-

w] l. si extoto. §. si ariz. De Legar. 1. & l. si ariz. De Leg. 2. & Gomez. Refol. Tom. 1. cap. 12. nu. 16.

x] lult. §. Cai. De Liberat. l. nom. de Leg. 3. De Pratis. lib. 4. int. 1. dub. 4. nu. 12 & dub. 7. nu. 65. & Alex. lib. 7. conf. 25. cum mulis alijs.

y] l. quæ situm. §. si mihi. De Legar. 1. & Pere. art. 48. nu. 10. z] Angel. Mar. lib. 1. cap. 19. de Legar.

a] Mantic. lib. 9. tit. 8. num. 2. b] Ranch. Decis. pt. 1. Concl. 335 & mantic. lib. 9. tit. 1. nu. 25.

c] Ranch. pt. 1. Concl. 314 & de Prælis. lib. 4. int. 1. Dub. 5. nu. 17. d] Ranch. ind. concl. 335.

e] De Prælis. li. 4. int. 3. dub. 3. nu. 29. f] Mant. d. tit. 8. nu. 2.

vise a Bond or Debt, owing to him by some Goldsmith or Banker, the principal whereof hath produced an encrease by the Interest thereof since the time of making the Devise. In this Case by the Civil Law the Legatary shall have such Interest in the Bankers Hands, as well as the Principal, which accrewed by vertue of the Principal during the Testators life, after the making of the Testament; (x) which by that Law holds true in all Credits producing an Interest or Accessory profit; yet it is otherwise even by that Law as to annual Rents payable out of Land, for therein the Civil doth agree with the Common Law, That the Arrears of such Rents behind at the Testators shall go to the Executor, and not to the Legatary, to whom the Land is Devised. (y)

20. If the Legacy be not in being, *in rerum natura*, at the Time of the Testators death, then neither the Thing bequeathed, nor the value thereof, is due to the Legatary; but if the Thing Devised is only by any Impediment obstructed from being delivered in kind, then the Devisee shall recover the true value thereof. (z)

21. If a Testator Devise in these words; *viz.* I give unto A. B. my Land called *Blackdown*, which I value at 100 *l.* this estimation thereof by the Testator shall not alter the Condition of the Legacy, as if thereby the Executor paying 100 *l.* to A. B. he shall be barr'd from having the Land in Case it be more worth. (a) On the other side, if the Land be less worth then 100 *l.* the Executor is not obliged to supply that undervalue; nor if it be more worth, may he retain the overplus. (b) Or if the Testator say, I give to A. B. my said Land, and my Will is, That if it be worth less than 200 *l.* that then my Executor shall make it up so much worth to him. In this Case if happily the said Land be found to be more worth, the Devisee is not obliged to restore the overplus-value. (c)

22. If a Testator doth appoint, that his Executor shall Sell such Lands to A. B. at a Price certain, limited by the Testator; the Executor must abide by that Price which is so limited by the Testator, though the Land be much more worth. (d) Likewise if a Testator doth by way of Condition to a Legacy enjoin the Legatary to do some special Thing; as the Repairing of a Church, or the like; which being finished, the Reparations exceed the value of the Legacy; In this Case none but the Legatary shall bear that overplus of Expence in the said Reparations. (e) And if an Executor be Appointed to give me such Lands or 100 *l.* In this Case if he doth not deliver me the Land, I must have the 100 *l.* be the Land more or less worth. (f)

23. If a Testator Devise part of his Lands called *Watermead* to *A. B.* not expressing what part, the Devise shall not be void by reason of uncertainty, but *A. B.* shall have the one Moiety thereof; And if the Testator himself had but a Moiety therein, or other lesser part, the Devisee shall have the one half of what the Testator had therein. (g) But if the Testator saith, I give to *A. B.* that part of the House which I inhabited, or was wont to make use of for my habitation; if it be uncertain and cannot well appear which part of the House that was, *A. B.* shall have the whole house, so as no other than the Testator did inhabit or used to dwell therein. (h)

g) Rebuff. ad l. nomen. §. Portionis. de verb. Sig.

h) Rebuff. ibid.

24. A man having several Houses in the City where he lives, and others in other places, saith in his Will, I give one of my Houses to *A. B.* In this case *A. B.* shall not be excluded his Legacy by reason of uncertainty, but shall have one of the Houses situate where the Testator lived, (i) or if he saith, I will that *A. B.* shall have one of my Houses, he shall chuse which he will have: But if the Testator say, I will that my Executor give one of my Houses to *A. B.* In that case the Executor hath the election to give him which he please. (k) And in case the Legatary having the election, makes more than necessary delays in determining his election, the Ordinary at the instance of the Executor, may fix him a time within which he shall finish the same, in default whereof he may Decree the election to the Executor. (l) But if by the Testators Will the election be neither in the Executor, nor in the Legatary, but in a third person, In such case that third person is to make the choice within one year next after he shall be thereunto required, otherwise the election devolves to the Legatary, whose choice in such case is not to exceed the Rule of Mediocrity. (m) And if the Legatary happen to dye before such election made by him, his Executor shall have it. (n)

i) Graff. § le. gatum. q. 62.

k) l. plane. §. pen. de Legat. 2. & l. 19. 23. l. si ita. §. ult. de Legat. 2. l. Frañ. Grimander. lib. 1. cap. 16. De usus l. mancipiorum. l. si Optio. de Option. Legat.

m) l. ult. C. Commun. de Legat. & De Practis. int. 1. dub. 3. fol. 4. inf.

n) Ranch. Decis. par. 1. concl. 387. & Guid. Pap. q. 214. charond. Reip. l. 7. c. 95.

o) Galgan. part. 2. cap. 5. q. de De Conditio. nis.

p) Papon. Notar. 1. lib. 10. tit. de Leg. verb. cels. pag. 710.

25. If a Testator doth by his Will appoint, That his Executor shall within a certain time deliver into the right and possession of *A. B.* such or such Lands by name, under the penalty of 100 l. In this case, if *A. B.* (the time being elapsed, and the Land not delivered) shall accept the penalty, he may recover the 100 l. but not the Land; But if he accept not the penalty, he may recover the Land, not the 100 l. (o)

26. If a Testator in his last Will and Testament doth Devise in this manner; viz. I give unto *A. B.* one of my Meadows, or one of my Houses. In this case the first choice is in the Legatary, whether he will have one of the Houses, or one of the Meadows; But then the second election is in the Executor; that if the Legatary chuse a House, the Executor shall appoint him which he shall have. (p)

27. If the Testator Devise a House; not expressing what House; it is a void Devise, if he had no House; but if he had several Houses, it shall be presumed to be that House wherein he usually dwelt, if his intention appears not to the contrary.

q) Menoch. de
Presum. lib. 4.
Præf. 129.

r) Mantie. li. 9.
tit. 2. nu. 35.
s) l. si ita lega-
tum. §. ult. de
Leg. 1.

t) l. qui usufr.
De usufr.

(q) And if the House Devised, afterwards happen to be burned, the ground whereon it stood is due and belongs to the Devisee. (r) But if it were pull'd down by the Testator himself, and not re-edified, it is otherwise; (s) for that implies a revocation of his mind and will. But if a House Devised happen to fall in the life-time of the Testator, the Legatary shall have the ground whereon it stood. (t)

28. Suppose there be a Mill joyning to the House which is Devised, or it be erected at the end of the Wall of the House, or Scituate at the end of the Orchard belonging to the House; the Question is, whether it shall pass to the Legatary with the Devise of the said House? In this case if the Mill was built by reason of the House, and to Grind for the use of the Family thereof, it shall then pass with the House in the Devise thereof; Otherwise, if it were built to produce an Annual Rent, or to Grind for any Strangers; whatever, unless it stand upon part of the ground of the very principal Mansion house, and within the Precincts of the same. (u)

u) Molina.
glos. §. nu. 5.

29. Suppose a man doth purchase certain Tenements of A. B. and other certain Tenements of C. D. with one and the same price, and with the same Sum of Money, and after doth Devise A. B's Tenements in these words, viz. I do give and Devise A. B's Tenements as I bought them, unto J. G. The Question is, whether C. D's Tenements do also pass by that Devise? It is Resolved in the Negative, unless it doth appear by sufficient proofs that the Testators intention was to comprise the one under the Appellation of the other, or unless the Testator used promiscuously to receive and place to Accompt the Rents of both in the name only of A. B's Tenements. (w)

w) l. Prædij.
De Legat. 3. in
§. Titio.

30. If a man having two Dwelling-houses joyning together, which have but one Kitchen, or but one Stable in common to them both, Devise one of these Houses; the Kitchen and the Stable shall pass with that House they joyn next unto, and through which the passage commonly is unto them, or which if demolish'd the Kitchen or the Stable could not remain use-

x) Alex. lib. 3. ful.
Confil. 54.

31. If a House Devised with all the things in it, It is to be understood only of those things that were in it when the Testament was made, and not of those things which the Testator brought into it afterwards; likewise if a House be Devised with all the things which shall be found in it when the Testator dyes,

it is not to be understood of such things as were brought into the House without the privacy or knowledge of the Testator, or which were casually and by chance brought into it; Contrariwise, such things as were casually carried out of the House, shall not be excluded out of the said Legacy or Devise; (y) nor any moveable Goods in the House which are not momentaneous, but ever remaining there as of Domestick use; For which reason Debts upon Bills or Bonds, Money, and Wares designed for Merchandize, and the like, are not within the said Devise of a House with all things in it. (z)

32. If a man Devise his Chamber, he is to be understood rather to have Devised the things belonging to the Chamber, than the Place. (a) But if a man Devise his Drapers-Shop, he is to be understood to have Devised rather the Place than the Wares therein, For that the word [*Drapers*] serves only by way of Demonstration to to shew what shop he meant; Otherwise, if he say, I Devise, my Shop and Cloth; in that case it shall be understood the Cloth in the Shop. (b)

33. If a man Devise a certain Field wherein any Edifice or Building doth stand, that Building doth pass by such Devise of the Field, if not expressly excepted in the Devise; (c) yea, albeit the Edifice were Erected after the Testament was made; but if the Field be Devised (excepting the Edifice thereon) the ground, in case the Building should be demolished, is likewise excepted out of such Devise. (d)

34. If a man should Devise the Fee of certain Lands to one, and the Rents, Profits, and Issuers of the same Land to another, and both in the same Will; In this case by the Civil Law the Rents thereof are equally to be divided between the two Legataries. (e)

35. Suppose a man in his last Will and Testament saith, I give unto my Wife the Tenement and 700 l. which I had with her in Marriage, when as in truth he had but 600 l. with her beside the Tenement; In this case she shall have 700 l. with the Tenement, (f) unless it can be sufficiently proved that the Testator did think or conceive that he had had 700 l. with her; in which case there is only 600 l. and the Tenement due to her by the said Legacy or Devise. (g)

36. A Legacy or Devise may be inferr'd from the mind and intention as well as from the Express words of the Testator. As thus, A. B. constitutes his two Sons his Executors, and in his Will sayes, That they shall not in any case Alien the Leases and Rents, which out of his Estate are about to come to them, but shall preserve them for Succession, viz. of their Children, and ordered it so, that he made his two Sons enter into Recognizance

y) l. si ita legatum. De legat. 3. & Manr. lib. 12. tit. 2. nu. 46.

z) l. quæsitum. §. Papinianus. de instrum. Leg. & l. de Leg. 3. & man. tit. ubi supra. Ranchin. Decis. part. 3. Concl. 280. Ang. Mathæus. lib. 2. c. 17. nu.

24. de Leg. 2. Manr. d. 9. tit. 2. nu. 49. & De Præst. lib. 4. int. 1. dub. 7. nu. 19. pag. 301.

b) Manr. d. tit. 2. nu. 52.

c) l. Si ita. in fin. De fundo instruct. Leg. chopinus lib. 2. cap. 3. de Priv. l. Rust.

d) Manr. d. tit. 2. nu. 23.

e) §. 1. Inst. de usufr. & l. si proprietat. De usufr. ad. crescend.

f) Menoch. de Præf. lib. 4.

Præsump. 145.

g) Surd. Decis. 142.

to observe his said Injunction accordingly, and dyes. The Successors of the said Sons claim and demand the said Rents and Leases by vertue of the said Devise. They cannot *De jure*, but after the decease of both the said Sons, it shall come to their said Successors, not before. (h)

b) gloss. in §.
pater filios. l.
pater filium.
De Legat. 3.

37. The omission of the quality or description of a Devise in a Will, albeit the Testator therein said he would insert the same, doth not viciate or null the Devise. Therefore if a man Devise certain Lands and Tenements with their Appurtenancee, situate nigh a Town, to the Corporation thereof; and in his Will saith [Which Lands and Tenements with their Appurtenances, I shall after in this my Will describe, and set forth the just bounds and Limits thereof; as also what I would have the said Corporation Annually to do in remembrance of me, for and in consideration of this my Devise] But being by death prevented, doth neither of these; the said Devise is notwithstanding

i) l. cum pater. good. (i)

§. vicos. in
gloss. ibid. De
Legat. 2.

k) gloss. in l.
Si quis lega-
verit de Le-
gat. 1.

38. If Land be Devised to A. B. and C. D. when A. B. is not in *rerum natura*, C. D. shall have the whole. (k)

l) gloss. in l.
Domus. de Le-
gat. 1.

m) l. si ita Le-
gatum. §. si
Domus. de
Leg. 1.

n) Ibid. & Bart.
in d. Leg.

39. A Testor doth Devise certain Houses to A. B. after the death of his Executor, and dyes; the Houses happen to be burnt, living the Executor, and by him Re-edified, the Executor dyes. In this Case the Executors Executor is obliged to surrender the Houses to A. B. but he may deduct the charges of Rebuilding them, if they were not burnt by any default of the first Executor; otherwise not. (l) But if they were burnt in the Testators life time, and by him Rebuilt, or others erected in the same place; In this case the Devise is void, unless it appears that the Testators mind was otherwise. (m) But if they were only mended, altered, and repaired so often that there remains now nothing of them at the Testators death as when the Testament was made, In such case the Devise is good. (n) The Law is the same in case of a Ship or other Vessel so often Repaired, that little or nothing thereof now remains at the Testators death, which was at the time of making the Testament.

o) l. si quis le-
gaverit. de
Leg. 1. & gloss.
ibid.

p) Bar. in di. l. quæ non reperitur, nihil importat. (p)

40. A. B. Possessed of certain Lands called the *Millfields*, in one corner whereof stood a Little Vineyard, made his Will, and therein Devised in this manner, *viz.* I give unto I. G. my Lands called the *Millfields*, excepting the Vines which shall be therein at the time of my Decease. A. B. after the making of the said Testament, and before his death did cut down the Vines which were in the corner of the said ground, and dyes. The Question is, whether the corner of the said ground where the Vineyard stood shall pass by this Devise? It is held in the Affirmative, (o) grounded upon that Rule in Law, *Exceptio rei*

41. A.

41. *A. B.* By his last Will and Testament doth Devise a certain House to *C. D.* in case his Ship returns within a year safe home from the *Straights*, makes his Executor, and dyes. The Executor doth Devise the same House to *J. G.* under another Condition. Depending that other Condition the said year expires, and the Ship not return'd from the *Straights*; whereby the first Condition of the Devise to *C. D.* fails, In this case the Devise made by the Executor under that other Condition, if performed, is good; otherwise it would be, in case the former Condition had been accomplished; in which case the Devise made by the Executor would have been void. (q)

q] gloss. in l. si iudam. §. cum statu lib. De Legat. 1.

42. If a man Devise a certain parcel of ground, and after Erect an Edifice thereon, the Building or Superstructure as well as the ground doth pass by that Devise, and the Devisee shall have them both; (r) because the Rule in Law is, *Quod edificatur in area Legata, cedit Legato.* As we use to say, *Cuius est solum ejus est usque ad calum.*

r] 1. si arez. de Legat. 2. & Bart. in dict. l. superficies sequitur solum. gloss. min. lit. a. in l. si tibi homo. de Legat. 1.

43. Suppose the Testator doth Devise one half of his Lands in *Dale* to *A. B.* and doth Devise the same half part of the same Lands to *C. D.* and doth Devise all his Lands in *Dale* to *J. G.* and so joyns them all in the thing, and disjoyns them in and by the words. In this case *J. G.* ought to have one Moiety of the Lands; *A. B.* and *C. D.* the other Moiety. After *C. D.* dyes before the day of performance of the Devise, by which means his part accrews to his Collegataries by way of Accreſſion, (or as we say by way of Survivorship) and not to his Heir nor Executor: Therefore as *J. G.* had more in the Devise than *A. B.* so now he hath more than *A. B.* in that part of *C. D.* (s)

s] gloss. in l. Maximo. de Legat. 2.

44. *A. B.* Possessed of divers Lands and Tenements, among which were certain Lands called *Lillystones*, and so called time out of mind; but in regard of its great Extent, he did for the better and more Commodious Letting it to Farm, divide it into two parts, and called the one the *Upper Lillystones*, the other the *Lower Lillystones*. *A. B.* makes his Will, and therein gives divers Lands and Tenements to his Niece, among which he gives *Lillystones*, not saying whether the Upper or the Lower *Lillystones*. The Question is, whether his Niece shall have all the said *Lillystones*, or onely one of the said divided parts thereof? It is Resolved, she shall have the whole, unless the Executor of *A. B.* can prove the Testator intended her only one part thereof. (t)

t] 1. Gaius Sen. & gloss. ibid. de Leg. 2.

45. A Testator makes his Son Executor, and in his Will saith, Let my *Hop-yard* at the lower end of my Orchard, and my Ground in the Parish of *D.* suffice my Cousin *A. B.* It is a good Devise of the Ground and Hop-yard, to *A. B.* So likewise, if he had only said, let my Cousin *A. B.* be contented with the said Ground and Hop-yard, or with my House situate in, &c. (u)

u] gloss. in l. fidei commiss. de Legat. 3.

w] gloss. min.
ibid. lit. r.
verb. fundus.

Note that in this case the person of the Devisee must not only. (as in all other Legacies) be certain, but also the Land Devise must by the Description of its situation be reduced to an infallible certainty; otherwise the Devise will be void. (w).

x] l. qui qua-
tuor. & gloss.
ibid. de Leg-
gat. 3.

46. *A. B.* Rents certain Orchards at 20 *l.* per ann. for the term of Seven years, makes his Will, therein gives the Fruit thereof for the residue of the term yet to come and unexpired unto *C. D.* & orders his Executor to deliver him the Lease, & to suffer him to enjoy the Fruits of the said Orchards for & during the term aforesaid. In this case the Testators Executor shall pay the said Rent, and suffer *C. D.* to enjoy the Fruits thereof; otherwise the Legacy might be nothing worth; or if Fruit fail worse than nothing. (x)

y] l. patronus.
s. libertis. &
gloss. ibid. de
Legat. 3.

47. An Erroneous demonstration by a Testator of the situation of Lands Devise by him, shall not prejudice the Devise. As thus, The Testator in his Will saith, I Devise my Lands of *Cammervell* which are in *Ireland* unto my two Nephews *A. B.* and *C. D.* Also my Lands of *Kirkaven* which are in *Scotland*, and dyes. After the Testators death there are found certain Lands which belonged to him called *Kirkaven*, but they are not in *Scotland*; The Question is, whether those Lands in the description of whose situation the Testator was mistaken, do belong to the Devisees? It is answered in the Affirmative, if it appear the Testator had any thoughts of Devising them at all. (y).

48. A Testator makes his Son Executor, and in his Will Prohibits him from alienating or Mortgaging the Estate or any part thereof, whereto he is entitled by such Executorship, commanding him to preserve the same for his Children lawfully begotten, and dyes. The Son for 100 *l.* doth Mortgage or sell outright to *A. B.* such certain Tenements of the said Estate as his Father the Testator left at his death in Mortgage to *C. D.* for 100 *l.* and with the Proceed thereof pays off the said 100 *l.* to *C. D.* to whom his Father in his life time had Mortgaged the same. The Question is, whether the Sons Obligation or Alienation thereof to *A. B.* contrary to the Testators express command, be good in Law? It seems not, because of the Testators Prohibition fortified with a Reason, That he would have it left to his Children lawfully begotten; but the Law is otherwise, and ratifies the Sons Obligation or Alienation thereof to *A. B.* Because it was a necessary expedient, and not of his voluntary choice; the Law touching such Prohibitions extending only to voluntary, not to necessary Alienations. (z).

z] l. Pater fili-
um. & gloss.
ibid. de Leg. 3.

49. *A. B.* makes his Will, and therein Devises certain Lands and Tenements to his five Sons by Name, under this Proviso or Condition, That if either of them Alienated his part thereof to a Stranger, that then that part so Alienated contrary to his Will should

should be and enure to the Crown for ever, and dyes. After Two of the Sons sell their parts to One of the other Three their Collegatories and dye. He after makes *A. B.* a stranger his Executor, gives him the said Two purchased parts, and dyes. The Question is, whether the said Two parts belong to *A. B.* or to the surviving Collegatories that did not Alienate, or to the Crown? It is Resolved, that they belong to *A. B.* and not to the Collegatories, nor to the Crown; Not to the Collegatories, because the person of *A. B.* the stranger is not here to be considered, but the person of the Purchaser who Devised it to him, who according to the Testators mind was one of those to whom the Testator permitted or tacitely implied a Sale might be made; And it is only they, not others, that are prohibited to sell their own parts; and therefore the parts which they purchase, are not, as those which they hold immediately from the Testator, prohibited by the express command or tacite intent of the Deceased, to be alienated to strangers. Nor to the Crown, because the Condition of the Devise, *viz.* Alienation contrary to the Testators meaning (without which the Crown is not entitled thereto) is not existent? for that the parts meant by the Testator, were sold to their Collegatory, and not to a Stranger, to whom indeed they were afterwards Devised, but not in derogation to the Testators sense and meaning, because not the person of the Stranger, Executor to the Purchaser, (as aforesaid) but the person of the Purchaser himself is chiefly to be considered. (a)

a] Dist. l. §. quindecim. quæst. gloss. ibid. de Legar. 3.

50. Note, That in a Bequest of Legacies, the word [*or*] is not much a Note of *Disjunction*, as of *Augmentation* (comprehending both;) because in Disposition of Legacies, the Law expatiates the Interpretation as far as it may have any consistency with the Testators mind and meaning, and will take its measures from the utmost Latitude of his intentions. For which reason if the Testator saith, *I give my City-house or my Countrey Farm to my Daughter; Anne, she shall have both.* (b) And this is the Common opinion, from which notwithstanding there are not wanting, and they not of the minor DD. who recede in their lib. 2. Consult. Judgments, and held That a *Disjunctive* in a Legacy ought to retain its force, so as the Executor may be least burdened. (c) which seems nothing inferiour to Reason in an impartial ballance; yet this may be relied on as indubitable, that where the *Disjunctive* is placed between two such things as are commonly conceived under the notions of *Genus* and *Species*, or between the *whole* and his *part*, then and in such case it shall be taken for a *Conjunctive*; as if the Testator should say, *I bequeath to my Wife my Plate, Jewels; or such things as I provided for her;* the latter words whereof are *Generical*; the former *Specificall*, she shall have

b] Graff. §. legatum. quæst. 66. & Alex. lib. 2. Consult. 163. nu. 4.

c] Molinæ. & Covarr. Resol. lib. 2. cap. 5. nu. 10.

both. Or if he saith, *I bequeath to my Wife my Wine which is in the City or in the Port*; the Port is held as part of the City, and she shall have the Wine in both. Likewise if any thing be bequeathed to D. E. or F. G. here in this case also the word [or] shall be taken for the Copulative [and] so that both of them shall equally take by this Devise, unless the one be of nearer kin to the Testator than the other; in which case the nearest of kin shall have it for his life, the other afterwards; (d) or unless it can be proved that the Testator did bear more affection to the one than to the other; in which case he to whom the Testator did bear most affection, shall be preferred; (e) or unless the one of them is not legally capable of the Legacy; in which case the word [or] shall stand, as properly it is, for a *Disjunctive*.

d) 1. cum pater, 5. a re. de Legat. 2.

e) Ripa. in c. inter ceteras. de Rescript. Extra. nu. 14.

Mich. 31. Eliz. Fowler and Owgley's Case. Anders. Case. 129.

One Devised his Lands to his three Daughters, and said further in these words, *viz. I will that every of them be others Heir by equal portions*. Whereupon it was doubted, when one of them dyed, whether the others should hold by survivorship as Joynt-Tenants, Or in this case as Tenants in Common. The whole Court was of opinion for the latter, and not as Joynt-Tenants, for that it appear'd, the intention of the Donor, was such in saying *That each should be others Heir by equal portions*, which could not be if there were a survivor, for thereby it is not possible the words of the Will can be of any force.

Trin. 38. Eliz. B. R. & Pasch. 41. Eliz. Ewer vers. Haydon. Cro. par. 3. Pl. 3. Pl. 4. Vid. Rep. at Large. in Cro. ubi supra.

Although properly Houses pass not by the name of the Lands yet in a Devise they shall pass by the Name of all the Lands, if the intendment be not otherwise by some Expressions of the Devisor; for though in a Writ nothing shall be demanded or recovered but according to its proper signification; yet in Wills Expressions shall be taken according to the Common intendment. Wherefore in a Will, by the Devise of his Land all his Houses may pass, or not, according as it is phrased by the Devisor; For if a man Devise all his Lands, his Houses shall pass; but if he restrain the word [Land] according to its genuine propriety, as Arable Land, or doth couple it with Meadow and Pasture, in such case the exposition of the word shall be taken according to the common intendment of the Devisor; or having both Houses and Lands in A. and B. doth say, *I bequeath to C. all my Houses and Lands in A. And to D. all my Lands in B.* In such case and by such expression the Devisor seems to exclude the Houses in B. out of the Devise to D. which expressly he includes in the Devise to C.

Trin. 36. Eliz. Ewer vers. Haydon. Moo. Rep. nu. 491.

Moore succinctly Reports the case thus, *viz.* Debt for Rent, the Defendant pleaded *nihil debet*. Whereupon it was found, That J. S. being seised of three Houses, and other Lands, Pastures, and Meadows in Watford in the County of Hertford; as also of a

House

House and Land in the County of *Oxford*, Devised the same in this manner, viz, *I give all my Capital Messuage in the County of Oxon, and all other my Lands, and Meadows, and Pasture in the Parish of Watford.* The Devisee brought Debt against the Lessee for years of the Houses in *Watford*: And it was adjudged Maintainable, because the word [Land] comprehends Houses, and the Houses shall pass by the Devise.

C H A P. XX.

Cases in the Law touching Legacies of Chattels Personal.

1. **C**hattels Personal may be bequeathed to one for life, and afterwards to another; in which case the first hath only the use or occupation, the other hath only the Propriety thereof. So that if one Will that *A. B.* shall enjoy the use of his Household-stuff during his life, and after that it shall remain to *J. M.* This is a good Devise thereof to *J. M.* (a) But if the thing itself be bequeathed to the first of them, then it is otherwise; for the gift of a Chattel Personal though but for one hour, is the gift thereof for ever; (b) Provided, the Testator make it Absolute, not Conditional.

2. *Chattels Personal* do pass under the legal Notion of *Movables*, as *Chattels Real* do under that of *Immoveables*; of both which the Law makes a Distinction into *Creatures Living*, and *Things inanimate*; albeit of the living Chattels Real there can but very few instances be given; Such was *Wardship* in respect of the Tenure of Land; As also *Villanage* for years; or that right which the Lord had in the *Villain* only for a Term; who resembled him whom the Civil Law terms *Ascriptitius Glebae*, or one in perpetual Obligation to the Plow on some certain Lands. The *Real Chattels Inanimate* chiefly consist in Houses, or Lands, or the issues thereof, as by Lease for years, or by Extent upon Judgments, Statutes, or Recognizances; Or if the Testator had a Term of years in certain Advowsons, Tythes, Profits of Fairs, Markets, or Court Leets, the Interest is a *Real Chattel* among the things *inanimate*; likewise a Presentation to a Church, upon the next avoidance, and before it come to be void, is a *Real Chattel*. (c) But of this, and Chattels Personal, with their respective Individuals, the Reader may have a more exact Description, if he hath a retrospect to *Cap. 6. Par. 3.* whereunto he is referred for clearer satisfaction.

a] 37. H. 6. 30.
Littl. Broo.
Sect. 388. 314.
209.
b] Hill. 9. Car.
E.R. the Lady
Davies Case.

c] Off. Exec.
cap. 5.

3. *A. B.* having two Brothers and one Son, makes his Son his Executor, and in his Will saith, That he would have his Son let the said two Brothers, (who are the Sons Uncles) have all the goods he hath in *D.* and *M.* or elsewhere, saying withall, That all these things he doth leave them for this Reason, because he would not that his Son should have any Difference or Controversie with them. In this case and by this Devise *A. B.* seems to leave his two Brothers only what was in common between him and them, and no more; This interpretation being grounded on the Reason annexed at the close of the Testators words, where he saith [Because his Son should have no difference or Controversie with them] by which Reason he seems to have a prospect of Differences like to arise between him and them by occasion of some goods in common between them (as is usual in cases of such Community) And thence seems by such words added to the Bequest to prevent such probable Differences, not intending to include within that Legacy such Goods as were not like to cause any Difference between them. (*d*)

d) l. cum pater. §. Dulcis. & gloss. ibid. de Leg. 2.

4. The first Declaration of the Testators mind Derogatory to the second, prevails against that second, unless thereby the first be specially revoked; And therefore if a Testator in the beginning of his Testament, saith, That to whom I shall bequeath twice, I would have it due but once; and then gives a Horse to *A. B.* After in another part of his Testament gives his Books to *A. B.* And after that towards the end of his Testament saith, it repenteth me that I declared my self in that manner in the former part of my Testament; for I incline that *A. B.* should have my said Books and the Horse; In this case the Legatary shall have them both, notwithstanding what the Testator said in the former part of his Testament; for a Testator cannot in his Will impose such a Law on himself, as from which by his Will he cannot recede; because only that which is indeed his Will, is his Law, and a Law unto it self, and that alone shall stand. (*e*)

e) l. Si quis in principio. & gloss. ibid. de Legat. 3.

5. If a man doth Devise to *A. B.* all that he doth possess in *London*; by such general words shall pass all that he hath in the *Suburbs*, as well as in the *City*; But his Books of Account or Cash in his Chests, which he hath either in the *City* or *Suburbs*, do not pass by such general words in a Will. (*f*)

f) l. uxorem. §. legaverat. & gloss. ibid. de Legat. 3.

6. If I bequeath 100 Books, the Legatary shall have 100 Volumes of Books, not computing the several Books that may be in one Volume, as so many of the 100. And if I bequeath him my Study or Library, she shall have only the Books, not the place where they are, nor other things that may be there. (*g*)

g) l. librorum. & gloss. ibid. de Legat. 3.

7. If a man Devise his House to *A. B.* with all the things therein when he shall dye; such things as are there only by chance; and

and did not use or were wont to be there, do not pass by that Devise; yet such things shall pass as only by some accident were not found there, but used to be there; But Money found there, which not long before was received from Debtors, and intended to be again Lent out, doth not pass by such Devise. (b)

8. If I bequeath Materials fit to make a Ship, and after do build a Ship therewith; the Ship doth not pass by that Devise. Or if I bequeath a Ship, and after do rip abroad that Ship, the Legatary shall not have the Materials thereof; yea though another Ship be afterwards built of the same Materials, he shall not have it. Yet if I bequeath a Wedge of Silver, wherewith any Vessel is after made, the Legatary shall have it, so as the form or fashioning thereof be not of more value or cost more, than the Silver it self is worth. (i)

9. A Testator had six Marble Statues; and a great quantity of other Marble; he Deviseeth two of his Marble Statues; and all his other Marble to A. B. whether by this Devise may the Legatary claim the Six Marble Statues? It is answered Negatively, he can have but two Marble Statues; because when the Testator gave him the Statues so specially and Numerically both, he seemed not to intend the Legatary should have the other four by that Devise; if so, he would not have specified in two, had he intended six, (k) but, rather in all probability would have mention'd six in stead of two; but if the number, or the Names of the Statues bequeathed be not specified in the Legacy, they will all seem to pass under the Genus of Marble *ex abundanti*. (l)

10. A man having two Horses, doth in his Will say, I give to A. B. the two Horses which I shall have when I dye; after the Testator sells his two Horses, and at his death is found to have only two Mares. In this case the Legatary shall have the two Mares; because in construction of Law the Feminine in such cases is compris'd in the Masculine. (m)

11. If a man indebted 20 l. hath Goods worth 100 l. and gives to his Wife the one half of all his Goods to be equally divided between her and his Executors; In this case the Wife shall have the one half of all the Estate personal, and that without any defalcation. (n)

12. Under the notion of *Housholdstuffs*, is not to be understood in any Will or Bequest, any Apparel, Books, Weapons, Toolcs, for Artificers, Cattell, Victuals, Corn in the Barn or Granary, Waynes, Carts, Plowgear, or Vessels fixed to the Freehold. (o) As for Plate, it is the common and fairest Exposition to understand only so much thereof within the Notion of *Housholdstuffs*, as the Testator himself in his life time did so understand, and as much thereof as himself did esteem rather as Utensils than Ornaments,

b] l. si ita Legatum. & gloss. ib. de Leg. 3. *Tit if a Bequeathed Ship be after so often repaired, that there remains nothing of the same Ship but the Keel, the Legacy is good.* l. quod in rer. nat. §. ult. ff. de Leg. 1.

i] l. lana. & gloss. ibid. de Legat. 3. *l. i. de aur. & argent. Legat. & l. legat. de Supellect. legat. & l. heredes meus. §. duz. & gloss. ib. de Legat. 3. l. dict. l. legat. & Cuiac. in dict. l. in toto.*

m] l. qui duos. & gloss. ibid. de Legat. 3.

n] Goldsb. 149. pl. 74.

o] Vid Swinb. par. 7. § 10. verbi. fin. §.

and

and accordingly made use thereof rather for the daily and ordinary service of his House, then for Ornament, Pomp or delicacy. And as touching Coaches, whether they are within the Notion of *Houholdstuffs* or not, I suppose the Reader will not easily be perswaded to joyn with those in their opinion, who hold it in the Affirmative; (p) unless he will also allow the Plow and the Cart (which are of more Domestick use and service than Coaches) to have the same Priviledge with the other.

p] swinb. ubi
supra.

13. A Testator may Bequeath the Corn growing on his ground at the Time of his death; yet if he be a Lessee for Years, and sowe the Land so short a Time before the Expiration of his Lease, that the Corn cannot possibly be ripe when the Term Expires, and he die before such Expiration of his Term; In this Case his Bequest of such Corn is void, because himself if he had lived, could not have Reaped it after his Term Expires.

q] l. Servis leg.
de leg. 3.
r] l. grege. de
de Legat. 1. &
gloss. ibid.

14. If a Man Bequeath all his Sheep, neither the Rams nor the Lambs are comprised therein; but if he Bequeath his Flock of Sheep, they are both therein comprised. (q) Or if he Bequeath 20. Sheep which he hath in his Flock, and which indeed is all his Flock, the Legatary shall have them all; because by this he Bequeatheth his Flock of Sheep. (r) Likewise if one Bequeath his Flock or his Heard to me, and the Testator living, some of the Flock or Heard die, and others put into their stead. In this Case the Legatary shall have them, because it is the same Flock or Heard as formerly: But what if one of them dies in that Case and notwithstanding such diminution the Legatary shall have the 19. though it be not the Flock which the Testator Bequeathed. Likewise if 19. die, so that but one only remains, the Legatary shall have that one. Also if a House be Devised, which is after burnt, the Legatary shall have the Ground whereon the House stood. (s)

s] l. si grege.
de Legat. 1. &
gloss. ibid.

15. A. B. Deviseeth his Horse to me and thee, willing that each of us should have a Horse entirely; in this Case one of us shall have the Horse, the other of us the value or Price of that Horse. (t) and in Case (the Testator being dead.) thou after make me thy Executor, who was before thy Collegatary, I shall have the whole Legacy, that is, mine if I will, or thine if I will, but if I take by the one, I cannot claim the other also. (u)

t] l. si mihi de
Legat. 1.

u] gloss. in
dict. l.

16. A Testator Sick in London, there makes his Will, wherein he appoints his Executor to deliver the Horses he had at *Edenborough* in *Scotland* to A. B. (then also at *London* with the Testator) the Third day next after his decease, and dies. The Question is, whether this Legacy be good or not? It seems not, because of the distance of Place rendring the Performance of the Legacy impossible at the Time limited by the Testator. But the

Answer

Answer is, the Legacy is good and possible, nor ought the distance of Place to prejudice the same, in regard the Testator might after the making of the Testament possibly live long enough to have the Horses brought from *Edenborough* to *London* timely enough to have the Legacy performed by the Time limited by the Testator, (w) if there were nothing else to be said in the Case, mihi. as indeed there is.

17. If the Testator saith, I give A. B. my Diamond-Ring which I believe is in my Cabinet; but in Truth is at that Time in the bottom of the Sea; his Executor is not obliged to pay the value thereof to the Legatary, nor to deliver it till it can be got out of the Sea, and then he shall be no less legally then miraculously obliged. (x) or if a Testator Bequeath 20. Gallons of Canary out of such a Hoghead, and there be found but Ten Gallons in it, the Legacy is not invalid; for the Legatary shall have the Ten Gallons, but no more. (y)

18. A Testator Gives and Bequeaths an Oxe to one, the Oxe dies before the day comes for the delivery of him to the Legatary; he shall have neither his Flesh nor his Hide; otherwise if he had dyed after the day for the delivery thereof was come. (z)

19. A Testator in his last Will and Testament saith: *I Will that after my decease my Executor hereafter named shall pay 50 l. per annum to my Wife, whilst she shall be with my Son in London.* The Son went from his Mother, yet staid in *London*, but not with his Mother. The Question is, whether the 50 l. per annum be due to the Mother? It is Resolved Affirmatively: But if the Son had gone out of *London*, and the Mother might have followed him, but did not, but continued still in *London*; the Legacy would not be due to her, save only for that Year wherein the Testator died; which shall be due, albeit in that Year she continued not with the Son above one day: But if the Mother could not follow the Son when he went out of *London*, nor can otherwise be duly charged with any neglect, wherefore she continued not with her Son, the Legacy of 50 l. per annum shall be due to her. The Reason of the Premises is, because the said words [*Whilst she shall be with my Son in London*] hath the force of a Condition. (a) In like manner if a Testator Bequeath any thing to A. B. *if he shall dwell in the City with his Son*, it is not required that the Legatary shall dwell in the same House with his Son; but if there be no mention made of any Place, as if the Testator should say [*if he dwell with my Son*] the Condition is not fulfilled by the Legatary, unless he dwell in the same House with the Testators Son. (b)

r] l. hzres. & gloss. ibid. de Legat. 3.

y] l. si quis seruum. §. 2. de Legat. 2.

z] l. mortuo Bove. & gloss. ibid. de Legat. 2.

a] l. qui quatuor. §. uxori. & gloss. ibid. de Legat. 3.

b] gloss. min. ibid.

20. If a Testator enjoyn his Executors to pay unto A. B. the Sum of Ten Pounds *per annum*, and he live Six Years and Four Months, the Executors of A. B. shall receive Ten Pounds for the whole Seventh Year; because such an Annuity is due in the very beginning of every Year, where no certain Time of Payment is set by the Testator.

26. Eliz. E. of Northumb. Case. Referr'd to Wray and Anderson. vid. Hughs Abr. verb. probat. of Wills and Testaments.

Not whether *Jewels* be Chattels, but what shall pass under the Notion of Jewels is the Question. For the Case was, the Earl of Northumberland Devis'd by his Will his Jewels to his Wife, and dyed possessed of a Collar of S's, and of a Garter of Gold, and of a Button annexed to his Bonnet, and also of many other Buttons of Gold and Precious Stones annexed to his Robes, and of many other Chains, Bracelets, and Rings of Gold and Precious Stones. The Question was, whether all these would pass by the Devise under the Name of Jewels. It was Resolved by the Justices, That the Garter and Collar of S's did not pass, because they were not properly Jewels, but Ensigns of Honour and State; and that the Buckle of his Bonnet, and the Button did not pass, because they are annexed to his Robes, and were no Jewels. But for the other Chains, Bracelets, and Jewels, they passed by virtue of the said Will.

CHAP XXI.

Of Legacies touching Goods in general, and what is to be understood under that Notion of Goods, and what by Moveables and Immoveables.

¶ Libonorum. de verb. sign. & Grass. §. Legat. q. 19. & mant. lib. 9. tit. 4. nu. 13. cum multis alijs. 46. Matheac. li. 27. cap. 17. nu. 23. de Legat.

1. **T**HAT *moveables* fall under the general notion of Goods is out of question, but whether Actions, and Rights of Action, and suits at Law depending fall under that notion, is a question. The *Affirmative* is not only the most Received, but (as Orthodox) the best approved Opinion, (a) though much opposed by some of the Learned who will not admit such Actions to pass by way of Legacy under the Notion of Goods, save when the Bequeathing words are universal; as when the Testator saith, *I Bequeath all my Goods*, or *I Bequeath a fourth part of all my Goods*. (b) Allcading, that if the words be only general words, as when the Testator saith, [*I Bequeath my Goods*] In such Case Actions and Titles to Actions are not comprehended therein, because

cause of the Pronoun [my] And that by the general word [Goods] is comprised no more than the Testator hath in his actual Propriety *jure Domini*. It is certain that if the Legacy of Goods in general be limited to any certain place, as when the Testator saith, [I bequeath the Goods which I have in my House] In such case Actions, because they are not Circumscribable properly by this or that place, do not fall under that general notion of Goods.

(c) Or if a man bequeath his Dutch Goods, the Bonds or Debts owing to the Testator in Holland pass not by a Legacy under that notion, albeit the Universal word [all] were added to it,

(d) unless it were a Legacy given by a Merchant, who may rationally be presumed to have in Holland Debts only owing to him. (e)

c) Dict. c. 17. v. 17. & Graf. dict. q. 19. nu. 3.

d) Pinell. ad Rub. C. de bon. mater. part. 1. nu. 10.

e) Pinell. ibid. nu. 12.

2. Such as assert Actions and Rights of Action to fall under the general notion of Goods, do yet deny them to fall under the notion of Moveables or Immoveables; for with much confidence it is affirmed, That by the *Jus Commune* Actions and Right of Actions are not Comprised in a Legacy of Moveables or Immoveables; No, (though the universal word [all] be added thereto; No, though the Note of universality should be geminated in the words of the Legacy, as when the Testator saith, [I bequeath to A. B. all my Goods Moveable and Immoveable where-soever they shall be found] And this is held even by those who yet allow them to fall under the general notion of Goods. (f) But this is contradicted by other of the Learned, who hold, That where the words of the Legacy are universal, in that case Actions and Rights of Action are comprised within a Legacy of Moveables and Immoveables. (g) Now then, to reconcile the difference between the Dissenting DD. in this point, the fairest opinion is, that they are comprised therein when the Testator geminates the words of universality, and abounds or superabounds in his sense that way, as when he says, [I give to A. B. all my Goods Moveable and Immoveable, and of what kind soever, or where-soever they shall be found; or other words to such most universal import. (h)]

f) Graf. 5. Legatum. ubi supra. & Pinel. ubi. part. 1. nu. 31.

g) Molinæ. ad Alex. lib. 6. Consil. 68. & Dec. Conf. 227. & 639. & Jo. Philippi. Resp. 64.

h) Ang. Mathematic. lib. 17. cap. 17. nu. 16. de Legat.

i) Peregr. art. 5. nu. 43. de fili. dei commiss. & Dec. Conf. 633. & 1. moven-tium de verbo. sign. & Alij.

3. All Corporeal Moveables inanimate which are only passive in their motion, as Books, Armour, Plate, Householdstuffs, and the likes; and all Animals moving or active in their motion, as Horses, Sheep, &c. fall under this general notion of Goods. (i) But what if the Testator in his Will saith [I give unto my Wife all my Moveable Goods and Householdstuffs of my House] whether shall the Wife have any of the Moveables other than such as are of or belonging to his House? Some are of opinion, that these words [of his House] keep this general Legacy under a Restraint, and confine it to the Moveable Goods only which are in or of his

k] Maar. 9. tit.
3. nu. 17. &
Mathæus de
Afflic. Decif.
106.

Houfe; others (and they the moſt approved) hold the quite contrary, and ſay, that theſe words are ſet to enlarge the Legacy, and give the Legatary the greater latitude of right even to other of his Goods which are not in his Houſe. (k) And whereas ſome raiſe a double objection againſt it, 1. That where the *Genus* (as in this caſe) doth precede and the *Species* follow, (the *Moveable Goods* being the *Genus*, the *Householdſtuff* the *Species*) there and in ſuch caſe the former is limited and reſtrained by the latter.

l] Mathæ. ibid.

2. That the Copulative [*and*] is here to be underſtood for [that is] Both which Objections are fairly answered thus; viz. The firſt Objection holds only where the *Genus* and *Species* are not diverſified in quality, but quite otherwiſe where they are or may be (as in this Caſe) of a diſtinct nature and quality; for in ſuch caſe both ſhall paſs by the Deviſe; as when a man bequeaths Nouriſhment and Phyſick to his Son. And the other Objection is as weak as the former, becauſe the Copulative [*and*] when it comes between two ſuch things as whereof the one may be included in the other (as it may in this caſe) is not to be underſtood for [that is] as in the Objection. (l) Indeed where a Teſtator doth add to a Deviſe of ſeveral things ſpecifically named ſomething in *General*, but limited to ſome certain Place; in ſuch caſe that local limitation will work a reſtriction upon all, though otherwiſe never ſo generally or univerſally bequeathed; As when he ſays, I give unto my Wiſe all the Houſhold-Furniture both Woollen and Linnen, and other Utensils of my Houſe; In this caſe he ſhall be preſumed to intend her nothing of all this out of or not belonging to the Houſe. (m)

n] Mantie. ubi
ſupra.

4. Whereas it is much controverted among the *DD.* (as appears by what was formerly ſaid) whether Actions and Right of Actions may be comprized within the Notion of *Moveables* and *Immoveables*, albeit the Note of univerſality be added to the Legacy, yet it is here to be obſerved, that it is agreed on all hands, that in caſes of neceſſity they are comprizable within a Legacy of *Moveables* and *Immoveables*; As when the Teſtator makes *A. B.* the univerſal Legatary of all his *Moveables*, and *C. D.* the like of all his *Immoveables*; and theſe two accordingly and to the effects aforeſaid his Executors, and dyes. In ſuch caſe for the prevention of the Teſtators otherwiſe dying partly Teſtate and partly Inteſtate, they are admitted to be comprized as aforeſaid. (n)

o] Rebuff. ad
l. moventium.
de verb. Sign.
& Ranchin.
par. 4. Concl.
23. & 24. &
Grati. §. lega-
tium. quaſt. 19.
nu. 5.

5. By what was formerly ſaid it is apparent, That when a Teſtator doth bequeath his *Moveables* Indefinitely, all his *Moveables* are therein comprehended, albeit at the end of the Requeſt he ſhould thereunto add ſome particular thing ſpecifically, as when

when the Testator saith, *I bequeath all my Moveable goods whatever and Householdstuffs of my House to A. B.* (o)

6. Among the *Moveables* are computed all such things as may easily and without prejudice be removed from place to place; (p) otherwise they fall under the notion of *Immoveables*, (q) as all other things affixed to the House, or (as we say) fix'd to the Freehold, or cannot well be removed without being damaged. (r)

7. An office, which a man hath for term of years, and may make Sale thereof, is computed among the *Immoveables*; (s) yet it hath been adjudged, That a Registers-Office is compris'd within the *Moveables*. (t)

8. *Doves* belonging to a Dove-house, as voluble as they are Naturally, yet are computed among the *Immoveables* legally, by reason of their Relation to the said Place, until they are taken and kept under Confinement; And therefore till such Capture they go to the *Heres Immobilium*, as the Civil Law styles the Heir, and not to the Executor. (u) The like may be said of Fish in the Pond, which are there for multiplication, breed, and encrease, and not for present use only. (w) The *Materials* also of a House pull'd down only with a design and intent therewith to rebuild the same, are computed among the *Immoveables*. (x) yea a Ship though she be never so swift a sailer, yet for all her hast is computed among the *Immoveables*. (y)

9. It is a Question much controverted, whether *Money* be it never so Currant, be comprehended within a Legacy of *Moveables*; As if the Testator should say, [*I give thee all the Moveable Goods in my House,*] and there be found at his death 1000 l. in his chest; [If this were the Readers Case, no doubt but he would soon resolve it in the Affirmative, and rather than fail, prove it syllogistically; whatever is Currant is Moveable, but Money is Currant, Ergo, &c.] But to be serious, for the better resolution of that doubt, distinction must be had between Money hoarded up in a strong Chest, for the safe keeping and preservation thereof that it may not be thence soon removed; and Money found in a Chest, there put not for that end, but for common use and Service, and for daily and ordinary expences. In the former case it passeth not by a Devise of *Moveables*; in the latter it doth. (z) And if it be doubtful for which of these ends it was there reposit, the presumption shall be for the Latter. (a) Which holds true, albeit the Testator should Devise the *Immoveables* only Indefinitely, or design this Money only to be Let out at Inte-

non legatur pecunia quæ Negotiationi ibi paratur. Mant. de Conject. ult. vol. lib. 9. tit. 3. nu. 3. ¶ Menech. lib. 4. Pres. 138. & Dec. Conf. 381. nu. 4. & ibid. Molin. a] Menoch. ibid.

o) Tepar. tit. de Legat. in genere. cap. 4. p) l. Titius. de Acq. rer. dom. q) l. 1. §. Si iusserim. de acquirend. possell.

r) Rebuff. ad dict. l. moventium. vers. moventia. de verb. Sign.

s) Charond. Resp. lib. 5. cap. 40. aut. 41.

t) Peleus. in Act. Forens. lib. 8. cap. 66.

u) Molin. ad Conf. Paris. par. 1. §. 1. gloss. 8. nu. 33.

w) Molin. ibid. nu. 18. & Grass. §. legatum. q. 19. in fin.

x) Papon. l. 17. tit. 4. arrest. 6.

y) Boerius. q. 177. & Strac. Tract. de Navib. part. 2. nu. 30.

z) whereas Money in a Devise is compris'd under the Notion of *Moveables*;

understand it only when *Moveables* are generally be-

queathed, not limiting them to any place.

Sed si Mobilia alicujus loci, veluti Domus, Relicta sunt,

rest.

b) Pinel. ad l. 1.
de bon. mater.
par. 2. nu. 44.
& 45.

c) Gail. Obs.
li. 2. c. 11. nu. 7.

d) Thef. Decif.
160. Mobilibus

Legatis, Lega-
ta Pecunia. l.

Si chorus, §. 1.
& l. si furdus.

ff. de Legat. 3.
Dec. Conf. 381.

nu. 4. Etiam
Cambilis tradi-

ta. Pinel. l. 1.
in 2. part. nu.

44. de bon.
Mater.

e) Thef. ibid.
& Mant. lib. 9.

tit. 3. & Me-
noch. de Ar-
bitr. l. 2. c. 489.

f) Menoc. dict.
Pras. 138. &

Mant. l. 9. nu. 3.
& Rench. De-

cif. par. 3.
Concl. 280.

g) ibid.

h) Perggr. art.
5. nu. 43. &

Alex. lib. 6.
Confil. 68. &

Mantic. ubi
Supra. cum

Mult. aliis.

i) Jo. Bacquet.
du Dro:it de

Justice. cap. 21.
nu. 84.

k) Glofs. in lfi
Titius. de Le-

gat. 3. Pars.
pro toto bi Fi-

gurative Law.
Pars pro Medi-

etate. by Law
indeed.

l) ibidem.

m) Richein.
verb. catalla.
fo. 32.

rest. There is a great quarrel among the DD. (for this Engine of all mischief is of a very Metasome quality) whether Money actually out at Interest be within the notion of *Moveables*; some affirm it, (b) others deny it, (c) comprising it under the notion of *Debt*, which seems most rational; But *Money* in Cash hath gain'd the more received opinion of its being comprehended within a Legacy of *Moveables*, albeit it happen to be much in quantity, (d) or designed for a Purchase, so, as it be not for that end of a great quantity. But in such Places where by common usage of Speech *Household-goods* are mainly and frequently meant or intended by the word *Moveables*, or if it be such *Money* as was only designed by way of Trade for Merchandise, the Testator being also a Merchant, and the quantity be great, or if the Testator bequeath all his *Moveables* in such a House, excepting none at all; In all such cases *Money*, how acceptable soever it otherwise be, yet is not admissible to any comprehension within a Legacy of *Moveables*. (e) Nor when any certain place is added to the Legacy, as if the Testator should say, *Egive my House to A. B. with all the things therein, none excepted*. (f) No; *Money* found hid in the Wall of a House, albeit the Testator should say, *[be the Moveables of what kind or Condition soever]*. (g)

10. And as for *Debts*, Bonds, and Obligations for *Money* owing, they are not within a Legacy of *Moveables*. Be the place where they are added or not added to the Legacy, (but make of themselves a third kind of *Goods* distinct from the former; (h) unless in such places where Custom prevails, That Obligations touching things *Moveable* shall be computed among the *Moveables*, and touching things *Immoveable* bequeathed among the *Immoveables*. (i)

11. If the Testator saith, *I give part of my Goods to A. B.* he shall have the *Moiety* thereof; for by saying a *Part*, and not what *Part*, the one half is regularly to be understood; (k) yea, though the Testator himself had but the one half of the thing bequeathed, yet the Legatary shall have a *Moiety* of that half, and albeit the Testator should say *a certain part*. (l) But if he saith *[any part, or what part soever]* then be it never so little, the Legatary must therewith be content, and the Executor is discharged.

12. Lastly, whatever was formerly said touching that Litigious subject of *Money*, though by some formerly held as none of the Testators *Goods* or *Chattels* (m) either *Moveable* or *Immoveable*; yet now the Law understands *Money* better than to exclude it out of that notion, and the opinion is now as Current as *Money* it self, That it is part of the *Moveable Goods* of the Deceased;

(n) un-

(n) unless it be Money arising of the Sale of Lands, Tenements, or Hereditaments appointed by the Testator in his last Will and Testament to be sold, or Money coming of the Profits of the said Land for any time to be taken; This Money is indeed by the Statutes of this Realm excluded from being reputed as any of the Goods or Chattels of the person so Deceased. (o)

13. Also by a Bequest of *Moveables* will pass the *Industrial Fruits* of the ground, or such as are there sown by the Industry of Man in expectation of a speedy removal thence with increase; (p) But not the *Natural Fruits*, or such as grow of their own accord without any great labour or cost; for these are not reputed *Moveables*, unless they were separated at the time of the Testator's death. (q) Thus Trees and Grass together with the Land whereon they grow, descend to the Heir as parcel of the Freehold: But the Corn growing thereon belong to the Executor as part of the Testator's Goods and Chattels. (r)

14. Where one bequeaths *all* his Goods and Chattels, or *all* his Corn, or *all* of any other thing; by such bequest doth pass not only *all* the Testator hath of that thing at the time of making his Testament, but also *all* he hath thereof at the time of his death; And not only the *all* thereof which he hath in Possession, but also what thereof he hath not in Possession but Expectation. But if he limit this *all* to a certain place, or as to or in the occupation of some certain person, then no more will pass by such Bequest than what he hath in such Place, or in the occupation of such a person at the time of making the Testament. (s)

15. And therefore a man may bequeath by Will not only those things which he hath at the time of making thereof, but also such things as he is to have, or may have afterwards. Thence he may bequeath the Corn that shall grow in such Ground the next year after his death, or the Wool or Lambs his Flock of Sheep shall yield the next year after his death; But in case there shall be no such Corn, Wool, or Lambs the next year, then the Legacy proves fruitless. Yet if the Testator bequeaths 20 Quarters of Corn, or 20 Lambs, and doth Will that the same shall be paid out of the Corn that shall grow, or out of his Flock the next year, and there be no such Corn, or not so many Lambs the next year, yet the Devise is good, and must be paid. The Reason of the difference is, because in the former Case there is such a Restriction and Limitation set to the Legacy as renders it questionable whether it might ever become due or payable; In the latter there is only Demonstration how it shall be paid, and nothing of any such Restriction as calls the Legacy in question. In the former there is a tacite Condition, in the latter the Legacy is Absolute.

n] S. & quia parum. Auth. de Nuptiis. & Rebuff. ubi supra. in L. Moventium. de verb. Sign. & Mantic. de Conject. ult. vol. lib. 9. tit. 3. nu. 2. Decii Conf. 381. & 472.
o] St. an. 21. H. 8. cap. 5.
p] Decil. Aven. 16. nu. 4. post. Paul. Castr. Conf. 132. quem Decius & alii sequuntur.
q] Decii Conf. 472.
r] Perb. tit. Devites. & Fulbeck. cod. tit. fo. 37. 38.

s] Plow. 343.

C H A P. XXII.

Law-Cases touching Money Bequeathed by the Testator.

1. **I**N the last precedent Chapter, it hath been Examined how far *Money* may be comprised under the notion of *Goods Moveable* or *Immoveable* bequeathed; It follows now, that for the clearer Illustration of this Desirable subject, we insert certain Cases in the Law touching the same; And because when *Money* is bequeathed, it often happens that a more than ordinary power is given to, or Latitude left in the Executor by the Testator, It is requisite in the first place to see how far a Legacy of *Money* left to the will of an Executor is good or not; which cannot well be Resolved without considering the several ways of disposal thereof; as thus, *viz.*

2. The Testator saith [*I would have 10 l. given to A. B. if my Executor's mind were not against it*] In this case *A. B.* cannot have the 10 l. unless he can first obtain the Executors consent for it; because a Legacy in that manner given is tacitely Conditional, and first requires the Executors Approbation even by the Testators mind and intention for the performance thereof; But if once the Executor gives his consent, he must then pay the 10 l. and cannot after recede from it to the prejudice of the Legatary. (a) Likewise, if the Testator saith, [*I give 10 l. to A. B. when my Executor will, or when my Executor please.*] In this case as in the former, the Legacy is not due till the Executor thinks fit, but must wait his pleasure, and be in a dilatory Expectancy as long as he lives, or so long as he doth not say he will pay it; But if once he declare that he will pay it, and after dyes before he doth pay it, his Executor is obliged to make it good; Contrariwise if the Legatary dye before the Testators Executor declares his consent to the payment thereof, for then it doth not accrue to the Legataries Executor, because it is Conditional till the Executor declares his consent to pay it, and such a Condition to be performed at the pleasure of another, as that the Legacy cannot come to the Legataries Executor before the Accomplishment thereof. (b)

a] gloss. in §. sic fidei commissum. l. Fidei commissa. de Legat. 3.

b] Gloss. ibid.

3. If the Testator saith, [*I give A. B. 10 l. if my Executor will*] In that case the Legacy is void, because there the Testator subordinates his Will to the Executors, makes his Executors Will Absolute, and his own Insignificant. But in case he saith after this manner, *viz.* [*If my Executor think fit, I give A. B. 10 l.*

or

Or if my Executor conceive it expedient, let A. B. have 10 l.] In these cases the Legacy is good, because here the Testator seems not to leave it wholly to the meer will and pleasure of his Executor, but as it were to the judgment of any honest or indifferent person, or (as the Law phrases it) *arbitrio boni viri*. The Law is the same, in case the Testator saith, [if my Executor see cause for it, or it seem reasonable to him. Let A. B. have 10 l. or I would have A. B. to be 10 l. the better for me.] For although a Legacy cannot be left to the meer will and pleasure of the Executor, yet to his just and reasonable will it may; for so it is left more to Reason than to his Will.

4. But what if the Testator saith [I give 10 l. to A. B. if he shall deserve it of my Executor] In that case the Legacy is due in case the Legatary shall carry it no otherwise towards the Executor than as any honest man would or might do in the like case; or no otherwise, than as any honest and indifferent person might or would be well satisfied therewith. Likewise if the Testator saith, [I give A. B. 10 l. if he hath not offended my Executor] the Legacy is due, if it appears that A. B. hath behaved himself towards the Executor no otherwise than what would satisfy any reasonable and impartial man. In a word, when it is left wholly to the meer free and arbitrary will and pleasure of the Executor, the Legacy is void; but when it is left to his will, only as it shall seem meet, just, and equal to him, it is good; for if in it self it be just and equal, the Executor may not interpret it otherwise. (g)

5. If a man Devise all his Lands to A. B. and his Heirs, excepting Twenty pounds for Ten years, which he willeth shall be employ'd for his Children; This is a good Devise of the Sum of Twenty pounds a year for Ten years. (b) Or if one bequeath 20 l. to the Children of A. B. who then hath three Children more or less at the time of making such Bequest; and after, but before the Testators death, he happen to have other Children; In this case those other Children he hath afterwards, shall have no part of the said Legacy, but the Children born at the time of making the Testament shall have it all. The Reason is, because in this case it is presumed the Testators intention did not extend to any not *in rerum natura*, when there were Children indeed, and at the same time in being.

6. The Testator saith [I give 100 l. to my four Neighbours, A. B. C. and D. Provided they bestow 10 l. in a Tombstone to be set on my Grave] Although B. should refuse to join with the rest therein, yet A. C. and D. shall have not only the respective proportion of the 100 l. but also that part that should have come to B. in case he had performed the Condition. Or, if he say,

g] Gloss. ibid.
lit. o. verb.
arbitrium.

b] Trin. p Jac.
in B. R.

[I give 100 *l.* to *A.* and such of my Three Children as shall come to my Funeral] and dyes; neither of his Children are at his Funeral; In this Case *A.* shall have the whole 100 *l.* because the Legacy is in the Conjunctive; were it in the Disjunctive he could

have but 50 *l.* (i)

i] Bart. in l. si tibi & ei. de Legat. 3. & gloss. in dist. l. & C. de Cad. toll. l. unica. §. ubi autem. & §. si non. Conditio uni conjunctorum infecta, in ejus persona deficiens, non minuit Legatum alterius, imo augetur per jus adcrecendi.

k] Gloss. in l. Si servus Legatus. §. Si ita scriptum. de Legatis. 3.

l] Gloss. ibid. m] Gloss. in l. pater filium.

§. fidei commissi de Leg. 3. n] l. Si Titio. de Legat. 2. & Gloss. ibid.

o] Gloss. min. in l. qui duos reos. de Leg. 2. & Bald. in l. eam quam. in fin. C. de Fidei commissis.

7. Suppose the Testator saith, I give 50 *l.* to *A. B.* And more than that 100 *l.* to *C. D.* In this case *C. D.* shall have an entire 100 *l.* but no more. (k) Possibly the transposition of the words may alter the Case, and make the Legacy worth 150 *l.* to *C. D.* As if he should say [I give to *A. B.* 50 *l.* and 100 *l.* more than that to *C. D.*] But suppose he should say [I give 100 *l.* to *C. D.* more than I have given to *A. B.*] when indeed he had given nothing at all to *A. B.* In that case the Legacy of 100 *l.* is good to *C. D.* notwithstanding that false Implication to *A. B.* (l.)

8. *A. B.* makes *C. D.* his Executor, gives in his Will 1000 *l.* to *J. G.* and therein saies, I desire that *J. G.* will pay the said 1000 *l.* to the Colledge of *W.* and dyes. After the said Colledge is dissolved, and before *J. G.* had received the said 1000 *l.* from the Executor of *A. B.* the Question is, whether *J. G.* shall now recover the 1000 *l.* from the said Executor (the Colledge to whom he was to pay it, being now dissolved) or whether it shall remain in the Executor? It is resolved, that in case there was no fault in *J. G.* why the 1000 *l.* was not paid to the Colledge before its dissolution, and the payment prevented for no other Reason but because of the said Dissolution; *J. G.* shall in such case recover the 1000 *l.* from the said Executor. (m.)

9. If a Testator bequeath 100 *l.* to *A. B.* and *C. D.* And after one of them appears incapable of taking by the Legacy, the other shall have only 50 *l.* and not the whole 100 *l.* (n) Yet there are, and they of the most Learned, who hold, That if one of the Legataries be incapable, his proportion of the Legacy shall accrue to his Collegatary, (o) as is evident by the former Case of the Tomb-stone; and never fails where the Legacy is in the Conjunctive, by the Law of Accrescion or *jure Adcrecendi.*

10. *A. B.* pawned a Jewel with *C. D.* for 100 *l.* then in his Will makes his Son his Executor, and orders that *C. D.* should sell the Jewel, and out of the Proceed thereof pay himself the 100 *l.* and restore the overplus of the value to his Daughter. Whether may the Daughter compel *C. D.* to sell the Jewel, and restore her the overplus? It is held in the Negative. But she may compel her Brother, who is her Fathers Executor, to Commence his Action at Law against *C. D.* in order to the Premises. (p) Or if the Testator say, I will that *C. D.* receive 100 *l.* and restore the Jewel, to my Daughter (not expressing of whom he shall receive the 100 *l.*) In that case the Executor is lyable for the 100 *l.* (q)

r] l. Si servus legatus. §. qui Margarita. & gloss. ibid. de Legat. 3.

q] Gloss. ibid.

11. Suppose

11. Suppose a Testator in his Will saith, *Whoever* shall be my Executor for the Goods and Chattels I have in *Ireland*, shall give 10 *l.* to A. B. in *Dublin*; the Testator makes three Executors for his said Estate in *Ireland*, and dyes. The Question is, whether every of these Co-executors (each of them having Administer'd to the said *Irish* Estate, and each of them having a part thereof in his possession) is obliged to pay 10 *l.* to A. B? And whether that universal word in the Legacy [*whoever*] hath that force in it as to make each of them obliged in the case for 10 *l.* each. It is Resolved A. B. shall have but 10 *l.* in all to be paid by, from, and among all the three Executors. (r) The Reason is Evident because they all make but one Representative, being distinct rather in their persons, than in their Office.

r] l. Si quis in fundi. gloss. ib. de Legat. 1.

12. A Testator having made A. B. and C. D. his Executors, in his Will saith, That either A. B. shall pay 10 *l.* to J. G. in lieu of a Legacy, or C. D. alone shall be his Executor; and dyes. They both Administer. In this case J. G. may sue both of them for the whole Legacy, and C. D. is as far forth lyable to the payment thereof as A. B. (s)

s] l. Si ex oro. De Legat. 1.

13. A Testator, whose Wife is big with Child, saith, *I will that if there be any Daughter born to me, my Executor shall pay her 100 *l.* and dyes.* After the Wife is delivered of Twins, viz. Two Daughters. In this case the Executor shall pay 100 *l.* to each, unless it appear the Testator intended the contrary. (t) In like manner, if a man bequeaths 1000 *l.* to his Daughters (without other words) and dyes, and his Wife after his death be within due time delivered of another Daughter, that Posthume Daughter shall claim proportionably with the others in the 1000 *l.* if the Testator by his Will made no other provision for her. (u)

t] Gloss. in l. filiabus. de Legat. 2.

14. A Testator bequeaths in this manner, viz. I give to A. B. 300 *l.* And I will that my Executors do pay 100 *l.* thereof out of the Arrears of Rent due to me out of such Lands, naming them, the other 200 *l.* out of such and such Goods to be sold; after the Testator receives in his life time the said Arrears of Rent, and Converts them to other uses, and dyes without altering his Will. In this case A. B. shall notwithstanding have the whole 300 *l.* The Reasons in Law are, (1) Because it was no Condition but only a Demonstration that had relation to the Legacy bequeathed. (2) Because a bare designation how or whence a Legacy may be paid, set after a Legacy given, makes it not Conditional. (v)

u] Dist. 1. filiabus.

15. Suppose a Testator saith, I bequeath some Money for the repairing of my Parish Church (not expressing how much) In this case the Legacy in favour of Pious uses, is good, though it be somewhat uncertain; And his Executor shall expend so much

v] l. quidam. & gloss. ibid. de Legat. 1. & Bartol. in dist. l.

Money as will suffice for the repairing thereof, unless it require a vast Sum, at least much too great for the Testators Estate conveniently to bear; In which case it shall be presumed the Testator intended no more than his Estate would conveniently admit; and the Ordinary in such case shall moderate the Sum with respect had to the Testators Estate. (x)

x] l. quidam.
& gloss. ibid.
de Legat. 2.

16. A man possessed of Goods and Chattels in *England* and *Ireland*, makes his last Will and Testament, and therein his Son, a Minor, his sole Executor, and A. B. his Guardian, and the Overseer of his said Will, to whom he therein bequeaths 100 l. and dyes. A. B. willing to have himself excused from the said Guardianship in part, refuses it as to the Estate in *Ireland*. In this case he shall lose the whole Legacy of 100 l. because the Law is, That a Legatary refusing the Office or Duty imposed on him by the Will, though 'but in part', forfeits his Legacy in the whole. (y)

y] l. etiam si.
de legat. 1. &
gloss. ibid. &
Bart. in dict. l.

17. A Testator makes his last Will and Testament, and therein appoints A. B. and C. D. his Executors; after doth annex a Codicil to his Will, and therein saith, I will that A. B. one of my Executors shall give J. G. 10 l. when I shall have given him the said A. B. 100 l. And dyes without bequeathing him any such 100 l. The Questions are, whether A. B. by reason of such words spoken by the Testator may have a right to that 100 l? And whether he be obliged to pay 10 l. to J. G? They are both answered in the Negative. (z) The reason in Law is, because words merely Enunciative, relating to something that should be done in time past or to come, without expressing the very thing it self, signifie nothing as to a sufficient disposal of any thing, which is not deduceable from any such bare Enunciations. (a)

z] Gloss. in l.
Titia, de Legat. 2.

a] Barr. in
dict. l.

18. If the Testator saith, I give thee 100 l. when thou shalt Marry, and thou art Married at that time when the Testator so made his Testament, and demandest the 100 l. upon the Testators death. In this case thou shalt have the 100 l. if the Testator at the giving thereof were ignorant of thy being then Married. But if he then knew thereof, thou shalt not have it till thou art Married a second time. (b)

b] l. si ita. §. si
pater. & gloss.
ibid. de Legat. 2.

19. If in two several and distinct Writings or Instruments, bearing one and the same date, the same last Will and Testament be found written *verbatim*, save that in the one there is mention made of a lesser Legacy to one, than there is to him in the other; the lesser only is due. As thus; A. B. going beyond Sea makes his last Will and Testament, the Tenor of which Will is exemplified or duplicated in two distinct Papers, as if the one was only a Duplicate of the other; only in the one of these is found a

Legacy

Legacy of 100 *l.* to C. D. But in the other a Legacy only of 50 *l.* to him; whereof the Testator takes one with him to Sea, the other he leaves at home behind him. In this case C. D. ought not to have more than one of these Legacies, and that the lesser also, viz. That of the 50 *l.* only. (e)

20. A Testator being possessed of 800 *l.* value in Goods, appoints A. B. and C. D. his Executors, and bequeaths 400 *l.* to A. B. And after sayes, whoever shall be my Executor, shall pay 200 *l.* to J. G. and gives several other Legacies to the full value of his 800 *l.* Estate, and dyes. C. D. refuses the Executorthip. In this case A. B. is obliged to pay full 600 *l.* to the Legataries, though 400 *l.* of the 800 *l.* were first given to himself. (d) Which differs from the Law as now practised, That after Debts paid a Legatary-Executor may first satisfy himself.

c) l. Sempronius. & gloss. ibid. de Legat. 2.

d) l. Si Titio. & gloss. ibid. de Legat. 2.

21. Any words, though in themselves of a defective signification, yet if such as whence the Testators mind or meaning is rationally deduceable and consequentially Colligable, are sufficient to uphold a Legacy; and therefore if a Testator willing to bequeath 100 *l.* to A. B. doth but say in his last Will and Testament, *I desire that A. B. would be contented with 100 *l.** Or that A. B. *would be satisfied with 100 *l.** or the like; It is a good Legacy to him of 100 *l.* (e)

e) l. Peto Lucii. & gloss. ibid. de Legat. 2.

22. An imperfect Speech by the Testator, which in it self leaves the sense incompleat, either spoken or written by the Testator in his last Will and Testament, is legally reduceable to a good Construction for the upholding of a Legacy, if the words precedent or subsequent hold good congruity therewith; as thus, A man in his last Will and Testament *inter alia* sayes, [*To my Son William 100 *l.**] In the words precedent he had said [*I leave my Dwelling-House to my Daughter Anne*] Or in the words subsequent he sayes [*I give 10 *l.* to my Brother George*] In such case albeit the words [*I Bequeath, or I Give, or I Leave*] or the like be omitted in that imperfect Speech relating to his Son *William*, yet in regard they are joyned with the words precedent or subsequent, it shall in construction of Law be understood as if they were joyned also to the words relating to his Son *William*, by reason of its congruity therewith, and thereby making the sense perfect. Otherwise if it were incongruous; As suppose the Testator had said [*That my Son William 100 *l.* or from my Son William 100 *l.**] And in the words precedent or subsequent he had said as formerly; In such case there would be no congruity with the said last imperfect Speech relating to his Son *William*, nor can they be joyned thereto without plain incongruity; and therefore in that case the Rule aforesaid would not hold. (f)

f) l. cum pater. gloss. in § 22. cum imperfecta. de Leg. 2.

23. A Testator makes three Executors, and appoints one of them by Name to take care of his Funeral, for which purpose he doth order him to receive 100 l. before hand. The Testator being dead, he receives the 100 l. of his Co-executors, but doth not disburse above 60 l. about the Funeral. The Question is, whether he shall retain the other 40 l. to his own use. The Answer is Negative, for that it belongs to all the Executors alike. (g)

2] l. Lucius Titius. §. A te peto. & glos. ibid. de Legat. 2.

24. If a Sum of Money be bequeathed to certain persons, on condition of something to be performed, the failure of one of them shall not prejudice the Legacy of another; as thus, viz. The Testator makes his three Sons his Executors, and in his Will saith [*I give to my Neighbour A. B. 100 l. and to such of my Sons as shall come to my Funeral*] and dyes. Neither of his Sons are at his Funeral. The Question is, whether A. B. shall have the whole 100 l. It is answered in the Affirmative, and that there is nothing in this case to diminish any part of the Legacy to A. B. (h) But if the words had been [*I give to A. B. and such of my Sons as come to my Funeral 100 l.*] In that case A. B. should have only 50 l. The reason of the difference is evident; for in the former case the Legacy is given Disjunctively, but not so in the latter. As hath been formerly stated and Resolved.

b] C. de Cad. tol. l. unica. §. ubi autem. & §. si vero non omnes. l. si tibi & ei. Et glos. ibid. de Legat. 3.

25. Suppose a Testator in his Will saith [*I give 10 l. to A. B. And if he chance to lose it, I give him 10 l. more*] In this short case are three points. (1) Whether the second Legacy be good? (2) Whether the Executor may require caution of the Legatary, That he shall so secure the first 10 l. that he may not be lyable to pay him a second 10 l. (3) Whether in case A. B. lose the 10 l. twice, or thrice, or oftner, the Executor be still obliged to pay him 10 l. more. The first of these points hath its solution by answering the second and third. Now the Law doth not warrant the Executor to require such caution in this case from the Legatary; to whom, if he should lose the 10 l. more than once, the Executor is not obliged to pay a third 10 l. which resolves the first point in the Affirmative. (i)

i] Fidei commissi. §. si quis decem. & glos. mag. & min. ibid.

26. A man dying intestate, A. B. pretended as if he would take out Letters of Administrations of his Goods; the Intestate dyed indebted 100 l. to C. D. So that A. B. might legally have been sued for it, if he had Administred to the Intestates Goods as he pretended he would. C. D. makes his Will, and therein J. G. his Executor, and gives 100 l. to the said A. B. saying withall that his Executor might easily satisfie that 100 l. to the said A. B. for that he the said A. B. owed him the said C. D. the Testator 100 l. by reason of his Administration to the said Intestate. C. D. dyes. After A. B. would not Administer to the said

said Intestates Estate as he pretended, but demanded the 100*l.* Legacy given him by C. D. The Question is, whether he ought to have it? It is resolved in the Negative, because it seems to contradict the main intention of C. D. the Testator, who gave him that 100*l.* as real Administrator to the said Intestate who owed C. D. 100*l.* But after appearing no other than a Pretender to the said Administration, the Law for the reason aforesaid excludes him from being a *Real* Legatary to the said 100*l.* (k)

k) dict. l. fidei commissi. §. item, de Legat. 3.

27. A Testator saith in his Will, That his Executor shall give his Lands situate in S. to A. B. and to C. D. more than this 10*l.* The Question is, of what import the words [*more than this*] are in the Legacy of 10*l.* to C. D? It is held, That by reason of the words C. D. shall have the whole 10*l.* and one Moiety of the said Lands Devise in manner aforesaid. (l)

l) l. si Sic locutus, & gloss. ibid. de Leg. 3.

28. A Legacy of 100*l.* is given to A. B. on this Condition that he buy such a House of C. D. which is worth 50*l.* and give it to J. G. The Legatary A. B. offers 50*l.* for the House to C. D. He will not sell it him under 100*l.* Q. whether A. B. is obliged to give the 100*l.* for the House, that so he may deliver it to J. G. according to the Testators will and meaning? It is resolved in the Negative; But he shall give the Testators value and estimate thereof, viz. 50*l.* to J. G. (m)

m) Gloss. in l. non dubium. de Legat. 3.

29. Suppose the Testator give thee 100*l.* That therewith thou mayest do something for a third person, specifying the person and the thing which the Testator would have done. Thou demandest the 100*l.* of the Executor; he refuseth to pay it thee unless thou give security to do therewith what the Testator required. The refusal of payment by the Executor is good; thou shalt not have the 100*l.* till thou give good security to do therewith as by the Testator is enjoyn'd. (n)

n) l. si tibi Legatum, & gloss. ibid. de Leg. 3.

30. Suppose a Testator gives 500*l.* to one, 400*l.* to another, and 300*l.* to a third. And after saith in his Will That A. B. shall have as much as one of the Legataries. The Question is, what A. B. shall have? Some have supposed, that he ought to have 500*l.* because in the greater the less is included; but the Law which prevails in such case is otherwise; he shall have only 300*l.* and no more, because the Executor being burdened with such Legacies, ought to have it in his power to give which proportion he thinks fit; And because it is a Rule in Law, That in all doubtful cases relating to the quantity of a Legacy, the least is to be understood. (o)

o) l. qui concubinam. §. cum ita legatum, & gloss. ib. de Legat. 3.

31. A. B. makes his last Will and Testament, wherein he disinherits his Son, and makes a Stranger his sole Executor, gives divers Legacies, and after in his Will sayes, That in case his Will should hereafter happen by any means to be so invalidated as to

be

be pronounced Judicially null and void, that thereby he should happen to dye Intestate, That then however his full purpose, mind and resolution is, That from such Administrator *ab Intestato* (whoever it should happen to be) shall be given 100*l.* to C. and 200*l.* to D. and dyes. After his said Son doth commence his Action and gets Judgment against the Will, which is Judicially pronounced null and void; the Son obtains Letters of Administration of his Fathers Estate *ab Intestato*. The Question is, whether the Son be obliged to pay the Legacies left by his now Intestate Father? It is Resolved in the Negative; for that not any thing now is vallid (in such case) which related to his Fathers mind or meaning in the said pretended Will as aforesaid. (p)

p) L. nec Fidei
commis. &
glos. ibid. de
Legat. 3.

32. To conclude. A Testator writ his Testament with his own hand, and therein said, That in regard he had found A. B. a very faithful Servant to him, and that he had done him many eminent Services, he desired to leave him not by way of a Legacy, but by way of Gratuity 100*l.* which he would have his Executor to pay him as a reward of his good Services, and dyed, Now in truth A. B. was such a person as by Law was incapable of taking by a Devise. The Question is, whether A. B. may demand the 100*l.* not as a Legacy, but as a reward for his Services aforesaid? It is held in the Negative; because it will be presumed it was left him in that manner *in fraudem legis*, on purpose to defraud the Law, which rendered him by reason of some legal Impediments incapable of taking by a Testament; And for that a Testators Testamentary Confession of his being obliged or in debt to a person in himself incapable, hath no operation in the Law, (q) other than to raise the Presumption so much the stronger, that it was made only *in fraudem legis*, specially when such Confession is voluntarily made in favour of a person incapable. (r)

q) Cum quis.
§. Titia. &
glos. ibid. de
Legat. 3.
r) Glos. min.
ibid.

C H A P. XXIII.

Of Legacies Relating to Debts, with certain Cases in the Law touching the same.

1. **T**Hings in Action, as Debts, are Deviseable by Will; therefore if the Testator bequeath any Debt due to him on an Obligation, or a Contract, or the like, the Bequest is good; for Obligations, as also Counterpanes of Leases and the like may be Deviled; only the Legatary cannot sue upon the Obligation in his own Name, nor enter for the Condition broken upon the Lease, if there be cause; but he may cancel, give, sell, or deliver up the Obligation to the Obligor, or surrender the Counterpane to the Lessee. (a) And it is an infallible Rule, That whatsoever ^{a]} *Perk. Sect. 527.* may come to the Executor after the Testators death in respect of his Executorship, may be Deviled by the last Will and Testament of the Testator. Therefore a Testator may bequeath a Debt due to him, and if he doth not make the Legatary his Executor as to that Debt, and he who is his Executor, shall refuse to sue the Debtor, that so the Legatary may receive it, in this case the Legatary may compel the Executor either to recover it himself, and so to pay it to the Legatary, or to give him power to sue for and recover it himself in the Executor's Name; And this the Legatary may compel the Executor unto by conventing him before the *Ordinary*, and on pain of Ecclesiastical censures to make him a Letter of Attorney for recovery of the Debt to him bequeathed, in the Executor's Name, in case the Executor himself doth not sue for it for the Legataries use, who cannot otherwise sue the Debtor, because he doth not represent the Testators person. But if it be such a Case of Action as is altogether uncertain, as where a man hath an Action against another for taking away his Goods, or for some Trespas done, the Testator in his life time, or to compel another to make an Account, or the like; such Cases of Action are not Deviseable.

2. Now the Law takes notice but of four wayes, within the Circumference whereof all Legacies relating to Debts do fall; As (1) when the Creditor bequeaths to one what his Debtor owes him; Or (2) when he bequeaths it to the Debtor himself; Or (3) when the Debtor bequeaths to the Creditor; Or (4) when a third person bequeaths to a Creditor what his Debtor owes. Suppose therefore that a Creditor should bequeath to one what A. B.

owes him, without expressing either the thing or the quantity; in this case he seems to bequeath his right of Action, nothing else; So that the Testator's Executor is no way obliged to such Legatary further than to deliver him the Obligation or Bond, and yield his Name (if need be) to the Action. (b) Yea, though the quantity were expressed by the Testator, yet the Executor is not bound to pay it to the Legatary, if the Testator joyn'd the very person of the Debtor himself with the execution or payment of the Legacy, as if he should say [*I would have A. B. receive the 10 l. of C. D. which he owes me*] yet even in that case, if the 10 l. cannot be recovered without Law, it shall be at the Executors, not the Legataries cost; and at the Legataries, not the Executors peril. (c)

Legat. 1.

c] Papon. in tit. de legat. Tritic. vers. Toutes fois, &c. & in Authen. Nunc si. C. de Litigios. & dict. L. si sic. §. ult.

3. Every Bond or Obligation is both Active and Passive; but in divers respects; Active in respect of the Creditor, Passive in respect of the Debtor: Active, when the Creditor bequeaths to a third person what his Debtor doth owe him; Passive, when the Debtor bequeaths to his Creditor what himself owes to the other. Between which two the difference is great; for when the Creditor bequeaths, he bequeaths either to the Debtor himself, or to some other person; In both which cases a Right is bequeathed; but with this difference, in the former a Bond or Obligation is bequeathed, in the latter a Discharge or Release.

4. And when a Creditor bequeaths a Debt, it is not always material to insert any certain Sum of Money in the Legacy of that Debt; for suppose the Testator says [*I bequeath the 10 l. which A. B. owes me*] be it to A. B. himself or any other; In that case a right rather than any certain Sum is understood to be given; because if A. B. owed the Testator nothing, then nothing is bequeathed, and so the Legacy Fruitless. (d)

d] l. si sic. §. si mihi. §. quod si. ff. de Legat. 1.

5. But now on the other hand, when a Debtor bequeaths what he owes, and the Legacy be given to the Creditor himself; In that case it is very material to see whether any certain Sum be express'd in the Legacy or not; for if there be, as when a Debtor-Testator saith [*I bequeath to A. B. 10 l. which I owe him*] In that case not so much a bare right only, as a certain Sum of Money seems to be bequeathed him; for which reason a Legacy of 10 l. will be good to A. B. albeit the Testator owed him nothing. (e)

e] l. legavi. in fin. ff. de Liberat. Legat. & l. 2. C. de fals. caus. f] §. Sed si uxori. Inst. de Legat.

6. But if there were no certain Sum express'd by the Debtor-Testator, as if he had only said [*I bequeath to A. B. what I owe him*] It is a Fruitless Legacy, if he owed him nothing. (f) In like manner, if a Testator saith [*I give my Wife what I had with her in Marriage, or her Marriage Portion*] if he had nothing with her in Marriage, the Legacy signifies nothing; yet if he had said [*I*
give

give my Wife 100 l. which I had with her in Marriage, or for her Marriage-Portion] though in crach he had nothing with her the Legacy shall be good, and is worth her 100 l. (1) Or having had 100 l. with her, shall in his Will say [I give my Wife 200 l. which I had with her in Marriage] the Legacy is good for 200 l. yea though he should therein refer himself to the Articles of Marriage, and add [as is contained in certain Covenants of Marriage made between us] The Reason is, because the Law more considers the thing it self when in *terminis* express'd in a Legacy, than any false demonstration thereof. (m) Unless it can be sufficiently proved, That the Testator meant otherwise than he spake, or that he err'd in supposing that to be true which was not so. In which case the Legacy avails nothing, albeit a certain Sum were in *terminis* express'd by him. (n)

7. For which Reason the Legacy is not good in such case, unless he certainly knew he owed nothing to the Legatary; otherwise it is, if he supposed he did, when indeed he did not. (o) And the Reason why a Legacy given by a Creditor, is nothing worth though the Sum be express'd, if nothing be due to him. And quite otherwise in the like case if the Legacy be given by a Debtor; the Reason I say of this Difference is, because the Creditor is understood to bequeath only a Debt, Bond, or Obligation; but the Debtor doth bequeath a certain Sum by Name, or the very thing it self expressly.

8. A Testator in his last Will and Testament *inter alia* saith, [wheretas I have in my custody a certain Instrument of Writing, wherein A. B. stands bound in the Sum of 400 l. for the payment of 200 l. to C. D. I will that my Executor shall restore the said Bond to C. D. or pay him 200 l.] After the Testators death the Bond cannot be found among any of his Writings, nor any knowledge thereof possibly had. In this case Judgment was given against the Executor, and he condemn'd in 200 l. to C. D. as a good Legacy to him by the said Testator. (p)

9. When a Debt is bequeathed, whereon nothing is due, the Bequest is Fruitless, if the Testator believed it to be a good Debt, albeit the Sum or quantity thereof were express'd in the same; But if the Testator when he bequeathed such Debt, knew there was nothing due upon it, the Legacy is good. (q) And although he who bequeaths a Bond, bequeaths the Debt contain'd therein; (r) yet he that bequeaths to his Debtor the Silver Cup or the like, which he had of his in pawn for 5 l. doth not thereby bequeath him that Debt of 5 l. (s) The Reason is, because there is nothing but the Pawn or Pledge released, the duty and personal obligation still remains. Note, that he who bequeaths his Debts, is understood to bequeath his Credits, that is, the Moneys or

[Instit. ibid.]

[l. 3. c. de fall. caus. & l. 1. in fin. C. de Dot. prelegat.]

[l. 2. c. de fall. caus.]

[Grass. §. de garum. q. 39.]

[Anto. Faber. lib. 6. tit. 17.]

[Surd. Decil. 142.]

[Mam. lib. 9. tit. 200. 9.]

[l. 1. ff. de Librag. Legat.]

what else is owing to him; for Debts, as was before observed, are taken both Actively and Passively; but in this sense of a Creditors bequeathing them, they are only taken Actively.

10. If a Testator bequeath to A. B. *whatever* C. D. *owes him*, and C. D. at the same time wrongfully detain'd the possession of certain Lands from the Testator; these Lands shall pass by the Devise to A. B. as well as the Money which C. D. owed the Testator; as hath been adjudged; (1) not at the Common, but Civil Law; for it is more than presumed, that at the Common Law such words, though in a Will not Nuncupative but Written, are no capable of being by any legal Intellect strain'd to a Latitude of that extent; or whether he that bequeaths his Books of Account, or his Shop Books, shall thereby be understood to bequeath the Debts contained therein, (2) as also the Moneys in the said Books Calendaried by way of Account, and design'd for Trade, as is likewise evident by the Civil Law. (3)

11. Although the Bequest of a Debt is a good Legacy so long as it is a Debt, and the Bequest unrevoked, yet the Payment of a Debt to the Testator in his life-time extinguisheth the Legacy thereof formerly Bequeathed by him; Not so, in case it were paid to his Executor soon after his Decease. (4) And this holds true, albeit the Debt consisted in some certain specific thing, if it perish'd in the Testators time; otherwise the Legacy is good. (5) Likewise, the Testators giving an Acquittance to the Debtor doth extinguish a bequeathed Debt. (6) The Reason hereof is, because by all these wayes the very substance it self of the Debt, which was the thing bequeathed, is destroyed, (7) yet here Note withall, That if a Testator doth demand a Debt, which he had bequeathed, not with any mind of abating the Bequest, but fearing the failure or future Insolvency of the Debtor, and shall after keep this Money by it self, with some signification therewith what Money it was; in such case the Legacy is good, notwithstanding such payment precedent; which holds yet more strong, in case the Testator demands it not, but the Debtor himself comes and offers it, and with such earnestness as the Creditor. Testator cannot well refuse it. (8) And if afterwards the Testator makes a Purchase with part or all of this money which he so demanded, not with any mind of abating the Legacy as aforesaid, the Bequest remains still good to the Legatary. (9) So that if I bequeath thee a certain Debt, and after ward demand and receive that Debt, and it appear not to what end or with what intent I did this, the Legacy of that Debt seems to be extinguish'd, unless I deposited the Money and set it aside or apart for the design of the said Bequest. (10) And although whilst the Testator lived, the Debtor were judicially condemn'd to him on the account of that Debt bequeathed

f) Theaur.
Decif. 235.

a) De Praxis.
lib. 4. int. 3.
dub. 7. nu. 22.
& Mant. lib. 9.
tit. 1. nu. 9.
w) Pap. Notar.
1. tit. de Leg.
verf. African.
& l. qui fillam.
ff. de Legat. 3.
& ibi Cujac.
x) l. si id quod.
ff. de Liberat.
Legat.
y) Bald. in l.
qui post Nu.
11. C. de Leg.
2) l. non quo-
cunq; §. qui
caium. ff. de
Legat. 1.
a) l. fidei com-
missa §. si rem
suam. ff. de
Legat. 3.

b) Mantic. de
Conject. ult.
vol. lib. 12. tit.
2. nu. 19.
c) dict. l. fidei-
commissa & dict.
§. si rem suam.
ff. de Legat. 3.
& Bald. ubi
supra. nu. 7. &
Alex. Con.
157. nu. 7. in
fin. vol. 7.
d) Al. x. lib. d.
& Cal. in dict.
§. si rem suam.

bequeathed, but not paid, the Legacy will hold. (e) Or in case the Testator having bequeathed Money owing to him, shall receive Goods in satisfaction of the said Debt, or it be legally so adjudged to him, and shall preserve such Goods, the Legacy shall not be understood as void, unless the Testator doth after alienate the said Goods. (f)

12. A. B. and C. D. are jointly Indebted in 100 l. by Bond to E. F. who makes his last Will and Testament and therein bequeaths in this manner, viz. [what A. B. owes me I give to J. G. and what C. D. owes me I give to J. W.] In this case it is said, that the Testators Executor is obliged to give the Action upon the Bond to one of the Legataries, and the value of that Action to the other. (g) Which seems not over-consonant to Reason, for they both owed him but one 100 l. yet the Executor after this rate must pay the Legataries 200 l. Besides, in the same Law it is acknowledged, that if the Testator after his Testament made, shall Release one of the said Debtors, the Legacy is void as to both the Legataries, because the Release of one Joint-Debtor is the Discharge of all the rest. (h) Which plainly Implies there is but one Debt in the Case; and if that be bequeathed twice, it can be due but once; the ballance therefore seems more equibrous, if the 100 l. were equally divided between the two Legataries.

13. A. B. makes his last Will and Testament, and therein appoints his Executor to give C. D. 100 l. provided that C. D. Surrender into his Executors hands a certain Bond or Obligation than in the custody of the said C. D. wherein A. B. the Testator stood bound to him the said C. D. in 40 l. and dycs: C. D. likewise dycs before the said Bond or Obligation is surrendered. The Question is whether the Executor of C. D. can claim the said Legacy of 100 l. It is resolved, That if the said Bond or Obligation were in being, and in the possession of the said C. D. at that time when the Testator made his Testament, and that C. D. knew of the Contents thereof, his Executor shall not have the Legacy of 100 l. because C. D. performed not the Condition of surrendering the said Bond or Obligation to the Testators Executor, and therefore could not transmit the claim of the Legacy to his Executor: But if it was not at that time in being, or not in the power of C. D. or that he were ignorant of the said Devise conditionally bequeathed, there seems an impossibility imposed on the Condition of the Legacy to C. D. which makes the Condition void, and consequently the Legacy pure and absolute to C. D. whereby it becomes Transmissible to his Executor. (i) The Reason in Law is, because a Legataries death before the Existence of a possible Condition doth extinguish the Legacy, otherwise, where the Condition is impossible. (k)

1) l. nepoti. in fin. ff. de fund. instruc. & Bald. in dict. l. qui post. nu 8. c. de Legar.

f) Bald. ibid. nu. 12. & Roman. Conf. 229. nu. 3.

g) l. non quocunq; glof. in §. fundus mihi. ff. de Legat. 1.

h) glof. ibid.

i) glof. in Lab omnibus ff. de Legat. 1.

k) Bart. in dict. l. §. in Testamento.

14. A. B. was obliged to C. D. in 10 l. Absolutely, in 20 l. Conditionally, and in 40 l. at a day yet to come. C. D. in his last Will and Testament saith, [*That whatever A. B. ought to pay me, I give and bequeath to J. G.*] and dyes. In this case the 40 l. whose day of payment was not then come, is not comprised within that Legacy to J. G. Because of that word [*ought*] otherwise, if he had said, I give to J. G. what A. B. ought to pay me now or hereafter. (l)

l) l. si scripserit.
et. & gloss. ib.
ff. de Legat. 2.

15. A. B. makes his Son and Daughter his Executors, and doth Devise certain Tenements, Bonds, and Obligations to each of them. After in his Will saith [*That he would have his Son pay all his Debts and Legacies, that so his Daughter may enjoy her Legacy entire to her self, and undiminish'd*] The Question is, whether the Son ought to pay all his Debts and Legacies? So as that the Daughter may have her full and entire part and portion? It is resolved in the Affirmative. (m) Yet understand it only as to her entire part and portion of her Legacy, not as to what she might otherwise claim as an Executrix.

m) l. nomen
debitoris. gloss.
in §. uni ex
heredibus. ff.
de Legat. 3.

16. A Testator in his Will appointed, That his Executor should lend A. B. 100 l. for three years at two per cent Interest. Q. Whether A. B. is obliged to give security by Bond with sufficient Sureties for repayment of the Principal with the said Interest at the three years end? Some are of opinion that he ought; but the Law is otherwise, and his own Bond is sufficient. (n)

n) l. fidei com-
missa. §. si
heres. & gloss.
ibid. ff. de Leg.
3. & l. omnibus.
ff. de Judic.

17. If a Bond or Debt by speciality be bequeathed to any one, the Executor is discharged if he Assign the Debt or Action to the Legatary, albeit the Debtor be Insolvent; as thus, A. B. makes his Will, and C. D. his Executor; in which Will he saith, I give to my Cousin J. G. the Bond or Obligation wherein J. S. stands bound to me in 100 l. After he adds a Codicill, and therein forbids the exacting the 100 l. of or from J. S. and moreover doth in the same Codicill require of his Executor C. D. That out of the Debt which N. O. doth owe him he should pay the 100 l. to his Cousin J. G. and dyes. N. O. mentioned in the Codicill is found Insolvent. The Question is, whether his Executor C. D. be obliged to pay the full 100 l. to J. G. It is held in the Negative, and that the Executor is Discharged from J. G. if he yield him the Action against N. O. though Insolvent. (o)

o) gloss. in §.
Civibus. l. Lu-
cius. ff. de
Legat. 2.

18. A. B. owes the Testator 10 l. or a Horse, the Testator doth bequeath the 10 l. to C. D. After the Debtor A. B. doth deliver to the Testators Executor a Horse, and is thereby discharged of the 10 l. because the Election was in him, and the Legacy of 10 l. to C. D. is void. But suppose the Testator had bequeathed the 10 l. to one, the Horse to another, and A. B. the Debtor

Debtor having the Election in him, paid the 10*l.* to the Testator's Executor; the Legacy of the 10*l.* in that case is good; and the Legacy of the Horse is void. *Et vice versa.* (p) Or suppose that A. B. did owe the Testator 100*l.* who saith in his Will [That, how much Money my Executor shall recover from A. B. so much I give to C. D.]. In this case the Legatary may compell the Executor to recover the whole 100*l.* for him from A. B. for this is no Conditional Legacy; because, if so, then the Legatary could not sue the Executor, unless he had recovered the Money from A. B. (q)

p) Gloss. in l. ut haredib. ff. de Legat. 2.

q) Gloss. ibid.

19. Debts by Bonds or Specialties are not comprised in a general Legacy; as suppose the Testator doth Devise to his Brother the one half of his Goods and Chattels (except the House wherein he lives, left him by his Father, with all the things therein) and make him his Executor of half of his Estate; and then Devise to his two Uncles the other half, and makes them his Executors of that Half. The Question is, whether all the things in the said excepted House to belong to his said two Uncles, or to his Brother. In this case we must distinguish between the things which were in the said Excepted House; for if there were any Debts by Bonds, Specialty, or the like, they are not comprised within the Exception made as aforesaid, but do belong both to the Brother, not as a Legatary, but as Executor of a Moiety, and to the two Uncles as Executors of the other Moiety; but if they are Silver, Household goods, and other things in the said excepted House, they belong to the two Uncles as Executors of a Moiety, not to the Brother, who is bar'd by the said Exception. (r)

r) Gaius Scius, & gloss. ibid. ff. de Legat. 2.

C H A P. XXIV.

Touching Election in point of Legacies; To whom the Election of a Legacy, express'd with too much Generality or Dubiety, belongs, whether to the Executor or to the Legatary; with certain Cases in the Law touching the same.

1. **A**S preliminary to this, it is requisite to know, That a Legacy may be too general, or of something too generally express'd, and that in a threefold respect; As (1) when it refers to something that is understood by the Notion of *Genus generalissimum*, as when the Testator saith [*I Bequeath something to A. B.*] In this case the Legacy is vain and Fruitless, because the Executor is discharged by giving any thing, or the least of any thing; Or (2) when it refers to something that is (if I may so say) sub-alternatively too general, that is, such a general as is made up of innumerable distinct Specificals; as if the Testator should say [*I bequeath a living Creature to A. B.*] In this case also the Legacy is void, by reason as well of its supergenerality as uncertainty; Or (3) when it refers to something less general, yet comprehensive of many Individuals, for kind the same, but different in value or estimation; as if the Testator should say [*I bequeath a Horse to A. B.*] Or, [*I bequeath a Ship to A. B.*] In this case it must be distinguished, whether such thing hath its Composition terminated by Nature, as Oxe, Horse, &c. Or by the Art of Man, as House, Coach, &c. In the former of these Cases the Legacy is good, and the Executor (if there be Assets) must procure it for the Legatary, in case the Testator had it not of his own at the time of his death. (a) But in the latter Case, the Legacy is not good, unless the Testator were a Proprietor thereof at the time of his Decease. (b)

2) Now the Question is, when the Testator doth Devise in such a general manner as is before described to be Devisable, who shall have the Election, whether the Executor or the Legatary? The first and Common answer is, That he shall have it, to whom the Testator by his Will in the manner of his bequeathing directs the Executative power of the Legacy, in case he hath not otherwise determined expressly the Election. For Illustration; The Testator saith, [*I will that my Executor shall give A. B. a Horse*] There the Executor Elects. Or thus, [*I will that A. B. shall have a Horse*] there the Legatary Elects. But if the Testator direct the

a) Gomez. Rec.

fol. tom. 1. c.

12. nu. 32. &

to. l. c. 11. nu.

8 & Graf. l.

legatum. q. 61.

& Ang. Ma-

theac. lib. 2. c.

21. nu. 2. de

Legat.

b) Gomez. ib.

& Vasq. de

Succes. Progr.

lib. 3. §. 27. nu.

35. & Graf.

dist. q. 61. & l.

Si Domus. ff.

de Legat. 1. &

Cujac. ad L. Si

fervus §. cum

homo. ff. de

Legat. 1.

the Executative power to neither of them, than the Legatary shall Elect, if the general Legacy be determined (as aforesaid) by Nature, and it be found among the Testators Goods or Chattels; otherwise, the Executor Elects, as when the general Legacy is determined by some Act of Man, (c) for instance, in divers Houses which the Testator hath in the same Corporation, and he Deviseeth one of them, but describes not which; otherwise if in divers Corporations; for then it shall be understood of the House in that Corporation where himself lived and dyed. (d)

3. For the more transparent inspection into this matter, it is requisite likewise to be known, and what indeed is plainly inferential from the Premises, that there may be and frequently is such uncertainty in Legacies as doth not destroy them; This election, whereof we now speak, consists in such uncertainties; But withall there are also such Obscurities, Dubieties, and Ambiguities in some Legacies, as admit of no Election, but only a Declaration, the Privilege whereof the Law ever Entitles the Executors and not the Legataries unto. (e)

4. Note, That if a Testator hath but two things of the same kind, whereof he indistinctly bequeaths one, the Legatary hath the Election; if more than two, the Executor. (f) And if the Legatary having the Election shall delay it longer than need requires, the Ordinary at the instance of the Executor may set the Legatary a time, within which he shall determine his Election, on pain of forfeiting his Election to the Executor. (g) But if the Legatary happen to dye before his Election, his Executor shall have it [b]

5. As it is a Question who shall have the Election, so likewise is it a Question what or which the Elector may Elect. If the Election doth belong to the Legatary, and it be given him by the Testator, the DD. are much at variance in the point; some holding that he may chuse in that case the best of the Devised Eligibles; Others say, not so, but *in medio consistit Electio*; Others distinguish and say, That in such case if the thing Devised be found among the Testators Goods he may chuse the best, otherwise he must content himself with a Mediocrity. (i) But the more received and approved Opinion is, That when the thing bequeathed is the Testators, and he expressly give the Election to the Legatary, he may then chuse the best. (k) And where ever the Law says the Legatary must regulate his Election, or take the measure of his choice by a rule of Mediocrity, (l) It is not meant of an Election given by the Testator to the Legatary himself, but to a third person for him, who not chusing at all, the Law transfers the choice not to the Executor, but to the Legatary. (m)

d] *Graff. ibid.*

e] *De Præstis. lib. 1. int. 1. dub. 3. Sol. 4. nu. 8.*

f] *Charond. Obs. in verb. Electio. & l. qui duos. l. si quis. §. penult. & l. legato. §. result. ff. de Legat. 1.*

g] *Fran. Griman. l. 1. c. 26. De Usuris. l. Mancipiorum l. si Optio. ff. de Opr Leg.*

h] *Ranchin. Decis. par. 1. Cons. 387. & Guid. Pap.*

i] *quæst. 240. & charond. Resp. lib. 4. cap. 95.*

j] *De Præstis. lib. 1. int. 1. dub. 3. sol. 3. nu. 7. & l. unum. §. si rem. ff. de Legat. 2.*

k] *l. 1. ff. de Opr. Legat.*

l] *l. ult. C. Commun. de Legat.*

m] *Cujac. Obs. lib. 13. cap. 14.*

6. Where the Law, and not the Testator, doth cast the Election upon the Legatary, there and in that case he may not chuse but what is inferior to the best, where there are more things than two of the same kind, subject to the Election. (n) On the other hand, when the Election belongs to the Executor, and the thing generally Devised be found to be among the Testators Goods, and but two of that kind, in that case the Executor may chuse the worst of them for the Legatary. (o) Yea, though the Testator had more than two, or many of the same kind, so as the general Legacy were of something inanimate, provided that that least or worst be not decay'd and altogether unprofitable, as Brass Money instead of the real *Diana*, or decay'd Wines instead of rich Canary. But when the general Legacy is of things Animate, then the Executor ought to chuse for the Legatary as not the best, so not the worst, but at an equal distance between them both. (p) But if the Legacy be not of generals, but of something certain and specifical, yet which of them the Testator (he having many of the same kind) intended, is a *Non Constat*; the Executor in that case may deliver the least; because now the Question is not so much touching the Election as the Declaration, which the Law ever gives to the Executor; for Election refers to uncertainties, but Declaration to obscurities, as in the last precedent Case. (q)
7. Suppose a Testator doth bequeath a Horse or an Oxe to *A. B.* which he will, or which he shall chuse; and he supposing an Oxe onely to have been given him in the Will, makes no other demand of the Executor than of the Oxe, who delivers it him accordingly. Afterward finding his error and understanding that he had it in his right to chuse either a Horse or an Oxe, demands a Horse and restores the Oxe. The Law is against him, and leaves him in this case without Remedy. (r) The Law is the same in case the Executor by the Will, having the Election in himself, whether to give him the one or the other, but supposing a Horse only to have been given him, doth deliver it to him accordingly, and after finding his Error would remand it, and give him an Oxe; he cannot. (s)
8. If a man bequeath to *A. B.* a Horse or a Yoke of Oxen, and the Testator hath neither Horse nor Yoke of Oxen, nor that which he so bequeathed; yet is the Legacy good, and the Executor chargeable therewith; In which case the Election as to the value of the thing bequeathed, whether in the Executor or the Legatary, may vary (as was formerly hinted) according to the Testators words in the manner of the disposition it self. (t) And therefore if a man bequeath one of his Horses to *A. B.* not saying which Horse, in this case *A. B.* shall have the Election, if there be more than one: But if the Legacy be directed
- [J] l. legato. ff. de Legat. 1. & De Præcis. dist. fol. 3. nu. 8.
- [J] l. apud Julianum. §. Scio. ff. de Legat. 1.
- [J] l. si hæres. ff. de Legat. 2.
- [J] l. in Obscuris. ff. de Reg. jur. In obscuris sequimur quod Minimum est.
- [J] l. si is cui. & gloss. ibid. ff. de Legat. 2.
- [J] Gloss. ibid.
- [J] Perk. Sect. 511, 515.

And not to the Legatary but to the Executor, as when the Testator saith, [*I will that my Executor shall deliver A. B. one of my Horses*] In that case the Executor hath the Election, and may deliver which of them, he will.

9. If the Testator saith, [*I give 10 l. to A. B. or C. D.*] at my Executors choice, or as my Executor shall chuse; and the Executor shall after make choice of one of them; and pay him 10 l. he is discharged from the other. But if he will make choice of neither of them, each of them may demand the whole 10 l. as if the Legacy were given to him alone; (u) and then he shall be preferred in this case who first Commences his Suit; (w) In other Cases who first gets Judgment.

u) l. si Titio. & gloss. ibid. ff. de Legat. 1. w) Bart. in dict. Leg. & Rubr. ibid.

10. If there be a doubt and dispute between two persons pretending to the same Legacy, to which of them it belongs; as if the Devise be to *Thomas Stiles*, without other description, distinction or discrimination of the Person, and there be two of that Name, of equal respect with the Testator, or both alike, his Friends or Acquaintance; In this case the Executor hath his Election to deliver the Legacy to which of them he please. (x) Yet some are of Opinion that in such case the Legacy is void and null by reason of uncertainty. (y)

x) l. si quis servum. § 3. ff. de Legat. 1. y) Gloss. ibid. l. cum in 2. ff. de optio. Leg.

11. I Devise to *A. B.* my Dwelling-house; if he doth not chuse my great Meadow in *Dales*. This is all one as if I said, I Devise to *A. B.* my said House or Meadow, which he will. (z) Or as if I said, I Devise to him my Meadow if he doth not chuse my Dwelling-house. In both which cases *A. B.* hath his Election. (a)

a) Gloss. ibid.

12. If the Testator saith that *A. B.* shall have one of his Horses, or that he shall chuse one of his Horses, which he will, and *A. B.* through a mistake doth chuse a Mare; he hath determined his Election, and though he repent of his choice and would restore the Mare, he cannot chuse again; (b) as also because Mares do pass in a Devise of all the Testators Horses. (c)

b) Gloss. in l. servi. ff. de legat. 1.

13. If a man having two Horses doth bequeath one of them, but it doth not appear which, in regard the words of the Legacy are not directed either to the Executor or Legatary, so as thence to infer unto which of them he intended the Election, In such case the Legatary shall have the Election; because it being certain that a Horse he bequeathed, but uncertain which, not expressing himself at which certain Horse he aimed the Legacy. The Executor shall not in this case interpret his mind; for in all doubtful Cases it shall be construed in favour of the Legatary.

c) l. Martianus. ff. de Legat. 3. & Col. Lex. verb. Legat.

d) C. o. 3. in l. qui duos. ff. de Legat. 1.

14. *A. B.* Covenants with *C. D.* to convey him such a Field, or to pay him 50 *l.* which of the two *C. D.* please. *C. D.* makes his Will, and therein gives to *J. G.* whatever *A. B.* owed to him the said *C. D.* and dyes. The Question is, what *J. G.* can by this Devise recover from the Executor of *C. D.* The answer is, he may compel him to Commence an Action against the said *A. B.* And as *C. D.* had his Election whether he would have the Field or 50 *l.* which Election upon his Decease came to his Executor : So now by vertue of this Devise that Election shall be in *J. G.* as the Legatary of *C. D.* (e)

e) Gloss. in §.
si quis ita. l. si
sic legatum. ff.
de Legat. 1.

15. A Testator having eight fat Oxen, saith I give them all to *A. B.* or 10 *l.* for each of them, at his own choice. *A. B.* doth choose four of the Oxen, and doth demand 40 *l.* for the other four. This the Legatary may not do; for the Legacy of all the Oxen is but one Legacy, and therefore may not be Divided, (f) Also the value of the Oxen is but one Legacy; for which reason may that neither be Divided. (g) The Case is the same, if a man bequeath 50 Gallons of Sack or Five Shillings for each Gallon, at the Legataries choice; he cannot divide the Legacy, but must take it all in Sack, or all in Money; Otherwise if such Division were Admissable, and the Testator should give such a Horse or Five pounds at the Legataries choice, this absurdity would follow, the Legatary might take Fifty Shillings, and one half of the Horse. (b)

f) l. neminem.
ff. de Legat. 2.
& gloss. in l. si
ex toto. ff. de
Legat. 1.
g) Gloss. ibid.

b) in dist. gloss.

C H A P. XXV.

When and How Legacies are Null, or become void or voidable; with Certain Cases in the Law touching Revocations.

1. **T**HE Reason why Legacies and Bequests do so often prove Ineffectual, is not so much because they were originally Null, or became afterwards void or voidable by any thing relating either to the State or Person of either the Testator or the Legatary, or by reason of some accident happening to the thing it self bequeathed : But because the just, honest, and self-denying Executor hath *fully Administred* (as the Common Plea is) and hath not Assets wherewith to satisfie the same. When the Legacy is originally void, it is understood as *Null*; when void by some subsequent Act relating to the State or Person of the Testator, then it is understood as *Revoked*; when by something relating

to the Legatary, then as *forfeited*; and when by some fatal accident happening to the thing it self bequeathed, then it is understood as *Lost*.

2. Now a Legacy or Bequest may be said to be Originally *Null*, when the Testator is a person Incapable of Devising at all, at least of Devising the thing Devised; or when the Thing it self Devised is not legally Devisable, or when the Testators manner of Bequeathing or Devising is altogether illegal; or when the Legatary or Devisee is such a person as is not legally qualified to take by a Devise. Likewise, the Legacy or Bequest is void or voidable by something relating to the Testator, when there is just fear in the case, or circumventing fraud, or immoderate flattery; It may be also by some kinds of error or uncertainty. Also by a subsequent or latter Will, or by Revocation, Cancellation, Ademption, Translation; as also for want of Assets. And when the Legacy or Bequest is void or voidable by something relating to the Legatary, It is commonly either by reason of some Incapacity in his person to take by a Legacy or Devise; or by reason of some injury done the Testator by him and high enmity betwixt them; or by endeavouring to conceal, sophisticate, or suppress the Will, or to obtrude and set up another in stead thereof, charging it with falsity; or by refusing to do some possible and reasonable thing incumbent by way of charge on the Legacy; or by an unwarrantable assuming to himself by his own Authority, and usurping on the Legacy without the Executors License, consent, or delivery thereof; or by a totall failure of some Condition annexed to the Legacy; or by the Legataries own waver and voluntary refusal thereof; or lastly by the Legataries death before the Testators, or before the condition performed, or before it otherwise becomes due. Finally, the Legacy or Bequest becomes void in respect of the thing it self bequeathed, when by some providential and fatal accident without any neglect or default in the Executor, the thing bequeathed doth either totally perish, or is decay'd as that it becomes useless and unprofitable.

3. Such as are Intestable, are thence legally disqualified to dispose of any thing by way of Legacy or Devise; and who they are, appears elsewhere. (a) Testaments made and Legacies given by such, are void originally, and such as are originally void by reason of any defect in the Testator, that defect ceasing shall not be privileged with any subsequent Ratification. (b) *A Testamento ad Legatum valet Argumentum.* An Original defect in the Testator will make the Testament and all the Contents thereof defective also. (c)

a) vid. par. 1. cap. 7.
b) l. si filius familias. ff. qui test. fac. pos.
c) l. si quatuor. ff. de Testa.

d] l. illa Institutio. ff. de hered. just. ultima voluntas non debet ex alieno arbitrio perdere. Bart. Rubr. in dict. l.

e] l. 2. in prin. Commun. Leg. & l. legatis. C. de Legat. & l. fidei commissio. in prin. ff. de Leg. & Alex. Conf. 100. nu. 7. vol. 4.

f] l. naru. ff. de Legat. 3 & l. in Epistola. ff. de fidei commissio. & Manr. de Conject. vul. vol. lib. 8. tit. 1. nu. 19. g] §. nostra. Inst. de Legat. h] ubi supra. cap. 6.

i] Jason. in §. Sed si sepe vit. l. cetera. ff. de Legat. 1. nu. 4. 13 & 14. k] Bart. in l. Servum filii.

§ si pocula. l. 1. ff. de Leg. 1. & C. qua situm. §. l. d. ff. de Legat. 3.

l] l. Scia. §. ab herede. ff. de aut. & arg. leg. m] l. non en. in ff. de. in offic. Test. & l. 1. ff. de excep. dol.

n] Bald. in l. si quis aliqui. test. prohib. C. & si char. in Rub. ibid.

4. If the Manner of the disposition of a Bequest or Devise be illegal, it renders the Bequest originally Null; as when the Testator wholly refers his Will therein to the pleasure of his Executor or any other person, as if the Testator should say, [I make such my Executors as my Son shall think fit] Or [I give 10 l. to whomsoever my Executor shall please] (d) There are several other ways whereby the manner of the disposition may be illegal, and possibly the more in regard of that vast extent and latitude of words, which the Law allows Testators in making Wills, and bequeathing Legacies; No words, or language, or signs almost but may serve for a Bequest, provided they be but sensible and intelligible. (e) Inasmuch that though the Testator should quite hold his peace, and but Nod thee a Legacy, whether he can speak or not; or whether interrogated thereunto or not, the Legacy is good. (f) Understand not this of the Testators nodding between sleep and wake, between sense and no sense, but when by his Nod he makes an intelligible sign of his mind and intention; the reason hereof is, because the Law more favours a Testators Will than his words. (g)

5. If the thing bequeathed be not legally Devisable, it is a void Bequest. (h) Or if the thing Devised or Bequeathed ceases to be the Testators, either by any voluntary act of his own, or thereunto compelled by some urgent necessity, the Legacy is extinguished. (i) Likewise, if by the Testator the thing bequeathed be in its very substance and body so changed into another form, that it is not reduceable to its pristine substance, In such case it will be presumed that the Testator hath also altered his mind, and the Legacy is void; otherwise in case it may again be reduced to its former shape and fashion; (k) for by the dissolution and change of the thing bequeathed into another form, and by the Testator himself, the Law presumes his mind and intent to be chang'd also. (l)

6. Although the thing bequeathed be Devisable, yet if the Legatary be incapable and legally disqualified to take by a Devise, the Legacy is as void in effect as if it had never been bequeathed; Now as one contrary is illustrated by another, so by observing who are the persons qualified to be Testable, you may infer who are the illegatible; and as all are Testable who are not by Law specially prohibited, so are may take by a Devise whom the Law hath made no special provision against.

7. Every Legacy given by a Testator, circumvented by Fraud to Bequeath the same, is void; (m) This is not to be extended to that kind of Fraud, which is known and understood by the Notion of *Dolus Bonus*. (n) And albeit Fraud specially in the Testator himself in reference to his Will be not to be presumed, (e) yet

(o) yet the Circumstances may be such as will render the suspicion thereof very Conjectural, which with some Adminicular proof may serve to invallid the Legacy, specially if Natural Affection, Piety, or Charity fall not under consideration in the Case.

8. Likewise, if the Legacy were, as it were extorted from the Testator, or being under a *Fear* did give the same, it is void.

(p) Here (as in several other Cases, purposely omitted to wave prolixity) the Law makes many Ampliations and Restrictions. If there were at the time of bequeathing a fear upon the Testator, it could not be (as it ought) *Libera voluntas*. Yet understand, it must not be every fear, or a vain fear, but a *just fear*, that is, such as indeed without it he had not made his Testament at all, at least not in that manner, nor given such and such Legacies. A *vain fear* is not enough to make either Testament or Legacy void; (q) But it must be such a fear as the Law intends, when it expresses it by a fear that may *Cadere in constantem virum*, (r) That is, such a fear as may produce such terrour as to cause a well resolved person, specially in his sickness and weakness to do what otherwise he would not. Now a less fear will serve to terrifie a Woman in this case, and so the Law understands it. (s) But each of these must be well proved, otherwise they do no prejudice either to the Testament, or any thing therein bequeathed. (t)

9. Inordinate, Importunate and Immoderate Flattery destroys also the disposition of a Legacy given to the Flatterer or any other by his Cychophantick Sollicitations and procurement; specially if fear preceeded such Flattery; (u) and Fraud accompanied it; (w) Or in case the Testators understanding be but little, and the Legacy great; (x) Or more especially if such immoderate Flattery proceed from such as have the chief care of the Testator in his Sickness, as his Wife, Physician, or the like; (y) Or in case there were a precedent Testament made by the Testator; (z) Or when the flattering words are spoken to a person much in Debt. (a) In all these Cases specially it is, wherein Immoderate Flattery, circumstantiated as aforesaid, shall invallid a Testament as well as the disposition of a Devise or Legacy.

10. Touching *Error* in the Testator in reference to the Legacy or Devise, it must be considered whether it be an Error of the Name, Person, or Quality of the Legatary; Or whether an Error of the Quantity, Quality, Substance, Proper Name, or Name Appellative of the thing bequeathed. If it be an Error only in the Proper Name of the thing Devised, it doth not hurt the Legacy, so as the *substance* thereof be not also mistaken; as when a Testator Intending to Devise *Long-acre*, Deviseeth it by

o) l. ex hoc
adicto. §. alie-
nare. ff. de
alien. indic.
mut. caus. f. 8.

p) Bart. in l. fin.
ff. si quis aliq.
test. prohib.

q) l. si quis ab
alio. ff. de re
judic.

r) C. ad audi-
entiam. & C.
cum Dilectus.
De iis quæ
met. caus.
funt.

s) Gloss. in c.
cum locum. De
sponsalibus.

t) l. ex hoc
adicto. §. alie-
nare. ff. de
aliena. judic.
mutat. caus.
funt.

a) Peck, de
Test. Conjug.
l. 1. c. 9 nu. 23.
& Jas. Richard.
Meno. &
alii.

w) Richard. in
l. ult. C. si quis
test. prohib.
nu. 13.

x) Molin. in
Apostill. ad
Dec. Conf. 489.

y) Molin. ibid.
Peck. ibid. nu.
6 & in cap. 17.

z) Socin. Jun.
Concil. 14.
Vol. 2.

a) l. generali.
& ibi Barr. ff.
de usufruct. leg.

the

the Name of *Black-acre*, erring not in the *Substance*, but only in the *Proper Name* of the thing Devised; In this Case the Devisee shall have *Long-acre*. Otherwise it is, if it be an error in the *Name Appellative*: As intending to Bequeath a Horse, he Deviseeth a House. The Reason of this difference is, Because the *Names Appellative* of things are Innumerable, being ever so called, and of natural Constitution, as House, Horse, and the like; and therefore an error therein is as injurious to Legacies, as an error in the very Body or Substance of the thing itself Devised. But the *Proper Names* of things being only such as are merely Accidental, and given or imposed by them, are Mutable and may be changed by Men, such as *Long-acre*, *Black-acre*, and the like; therefore an error therein only doth not prejudice the Legacy.

b) l. si quis in
fundi ff. de
Leg. 1. &c.
Gloss. ibid.
c) gloss. ibid.
verb. vocab.
d) l. quotiens
ff. de hered.
Inst.
e) gloss. in
dist. 1.

(b) But if the error be in the *Name Appellative*; the Testator saying, I Bequeath a Horse when he intends an Oxe, the Legacy is not good; No, not of the Oxe, albeit his intention thereof were evident. (c) The Law is the same in Case the error be in the Substance of the thing Devised; as if the Testator intending to bequeath 5 l. doth bequeath his *White Mare*. (d) Such an error is as destructive to a Legacy, as an error in the *Name Appellative* thereof, (e) or as an error in the *Person* of the Legatary, which is as prejudicial to a Legacy as either of the other; whence it is supposed by some, that *Jacob* was not *de jure* his Father *Isaac*'s Heir but *Esau*, because by an error he mistook *Jacob* for his Son *Esau*, thereby erring in the very Person of the Legatary, and in the very Body and Substance of the Person he meant and intended, the best Salve in Law (not wading into the Mystery of Divine Preordination) for this is, That *Isaac* did not altogether erre or mistake in this matter; but doubted only, in that he said, The Voice is *Jacobs* Voice, but the Hands are the Hands of *Esau*; whence it may well be inferr'd, that *Jacob*, and not *Esau*, was *de jure* his Heir; for though Error in the Person of the Legatary, or in the Body or Substance of the thing Bequeathed doth viciate the Legacy, yet a bare Dubitation or Hesitation doth not. (f) And as touching an error only in the *Quantity* of the thing Bequeathed, such error doth not prejudice the Legacy, at least not so as to invalidate the same; for if the Testator intending to Bequeath 20 l. doth either speak or write but 10 l. the Legacy is good for 20 l. or intending to give only 10 l. says 20 l. it is good only for 10 l. (g) Or if 200 l. be written instead of 100 l. it is good only for 100 l. that is not according to the scription, but according to the Testators intention. (h) And as thus it is *Quantities Numerical*, so also it holds in *Quantities known and distinguished from the other by being Quotative*, or indeed more properly *Quantitative*; as if a Testator intending

f) gloss. min.
in dist. 1. quo-
tiens.

g) gloss. mag.
ibid.
h) ibid.

to Devise all his Mansion-house, doth express himself only by the one Moiety or third part thereof. (i) Likewise Error only in the Quality of the thing Bequeathed, doth no more vacate a Legacy, than doth Error in the Quantity, provided the Substance of the thing be not also mistaken: (k) But an Error in the Quality of the Legatary, where such Quality was the Final Cause of the Legacy, that is, such as without which the Testator would not have given the Legacy, (l) doth viciate the same; because the Law presumes the Testators intention to cease at the ceasing of the Final Cause thereof; otherwise if the Quality be only such, as were merely a Demonstrative or Moving Cause; (m) yea or an Impulsive Cause, if it be not by way of Condition joyned with the Legacy. (n)

11. *Uncertainty* is another Impediment to the validity of a Legacy, and will make it void, (o) unless by a sufficient proof you can reduce the Testators meaning to a Certainty; so that if the Testator bequeath a Legacy to such a one (not naming any body) as shall do such a thing; (naming the thing) this Devise is good to him whosoever shall first perform the Condition before or after the Testators death. If this *Uncertainty* refer to the person of the Legatary, the Legacy is void; (p) unless he who at first was uncertain doth afterwards by some future Event become certain: (q) As if the Testator should say; I give 100 l. to whomsoever shall make my Son fit for the University. If it refer to the thing Bequeathed, and proceed of Error, it's visible by the Premises in what Cases void or not; if it proceed of too much *Generality* of the words of the Bequest, the Executor is discharged if he give any thing to the Legatary; if it proceed of words too General relating to any Specific thing Bequeathed, limited not so much by Nature as by Man, as House, Ship, or the like, the Legacy is void. (r) If it refer to Number, Weight, or Measure, the Bequest is unprofitable, because never so little is enough in that Case, (s) unless Bequeathed to some certain use, by which means it may be Regulated, and so reduced to a kind of Certainty. If it refer to the Date of the Testament wherein the Legacy was given, when there are Two such Wills in Dispute, neither is good, (t) unless one of them be in favour of the Testators Children, or to Pious Uses; in both which Cases the Presumption of Law affirms that Will (where Two are in Being) which makes for either of them. (u) But if both the Wills of the same Date relate the one to one of them, the other to the other; in that Case the Testament which respects the Testators Children shall be prefer'd;

C. de Edicto. D. Adr. toll. & Mant. de Consect. ult. Vol. lib. 3. tit. 15. nu. 17.

f) Jason in l. qui quartam. ff. de Leg. 1. ubi valet Legatum. Lieet Error in quantitate five continua five discreta.

g) Angel. in dict. l. si quis in fundi. ff. de Legat. 1.

h) Mant. de Consect. ult. Vol. lib. 4. tit. 5. nu. 16.

i) l. falsi. demonstratio.

in prin. ff. de Cond. & Dem.

j) Richard. in Rub. de hered. inst. nu. 3. C.

k) Grass. Thef. Com. Opin. 5. Legat. q. 64.

l) Bart. in l. quidam ff. de reb. Dubijs.

m) dict. l. quidam. & ibi Bart.

n) Zac. lib. 1. sing. respons. in prin. nu. 33.

Alex. & Angel. in l. si Domus ff. de Legat. 1.

o) l. nummis. ff. de Leg. 3.

p) gloss. in l. ult. C. de edit. Di. Adria. tol.

q) Bart. in l. 1. § 1. ff. bon. poss. secund.

Tabul. & Richard. in l. ult.

m. Ibi Mant.
lib. 6. tit. 3.
nu. 43.

x) In C. cum
tibi. & ibi DD.
omnes de Te-
stam. & Bald.
in Executor.
nu. 8. ff. de Ex-
ecutor. rei judic.
Idem, in Conf.
296. nu. 1. Vol.
5.
y) l. in tempus.
§. 1. eodemq;
ult. ff. de hæ-
red. inst. & §.
incertis, inst.
de Legib.

z) l. quidam
relegatus. ff.
de reb. dub.

a) l. rem le-
gatum. l. si
servum. ff. de

adim. Legat. 2.
b) l. unum ex
familia. §. si
rem tuam. ff.
de Legat. 2.

c) l. si ita scri-
ptum §. Regu-
la. ff. de

Lib. & Posth.
& Bald in l. ult.
ru 9 de Instit.

& Subst.
d) Bart. in l.
proxima. in
fin. ff. de his

quæ test. delen.
e) l. si iure. ff.
de Leg. 3 & l.
§. ult. ff. de
adim. Leg.

(w) and yet this Uncertainty doth not alway invalidate a Lega-
cy to *Pious Uses*, where there is no other Will of the same Date
in the Case; for if the Testator Wills, That his Goods shall be
Distributed [without other words] the Law supplies the
sense, and interprets his meaning, to have it Distributed among
the Poor. (x) It is presumed, the Law means where the Te-
stator dies without Issue. This Uncertainty doth seldom arise
from any dubious Expressions used by the Testator relating to the
person of the Executor or Legatary, in both which Cases both
Will and Legacies are void respectively; (y) But it may often
happen where the Testator hath more Friends than one of the
same Name, of equal Degree to him, and Respect with him, as in
Brothers or Sisters Children, unless he add some Distinction, or
other Circumstances make it Evident whom he meant or intend-
ed; or unless it may (as was before hinted) be Reduced to a Cer-
tainty by some future Event. (z)

12. Again, a Legacy or Devise may be void by the Testators
making a latter Will, and not inserting the same therein. Like-
wise the Testators voluntary Alienation of the thing Bequeathed
is an actual Revocation thereof. (a) The Reasons are, because
the Law thence presumes the Testator would not have his Exe-
cutor burthened with the Redemption thereof. (b) As also be-
cause a Revocation in the Law hath as much force to Revoke, as
a Disposition hath to Dispose. (c) *Et Contrariorum eadem est*
Ratio. The like effect to make void a Legacy hath Cancellation,
or when the Testator himself, or by his order, doth totally
Cancel the Legacy; yet if a Legacy given to Pious Uses be found
Cancelled, and it appear not whether the Testator or any other
by his direction did it, the Law will presume it to be done
not wittingly and willingly, but *inconsulto* and *unadvisedly*. (d)

13. A Legacy or Devise may also be made void by *Ademption*,
which is a taking away of the Legacy by the Testator expressly
in Fact, or in Construction of Law. And this *Ademption* may
be by the meer naked Will and Pleasure of the Testator, without
any Reason solemnly given by him for so doing. (e) And in a
Codicil he may make an *Ademption* of that Legacy which he had
before Bequeathed in a Will: As thus, *viz.*

14. *A. B.* of London being bound for *Tork*, makes his last Will
and Testament before he begins his Journey, wherein he appoints
C. D. and *E. F.* to be his Executors. And commanded, That in
Case he should happen to die at *Tork*, they should give *I. G.* of
that City 100 *l.* to bring his Body to *London*; and if any Money
of that 102 *l.* were left over and above the Charges of such his
Funerall, *I. G.* should have it. The same day *A. B.* makes a Codicil,

cil,

cil, and therein desires his Executors, That in Case he dyed at York or on the Road, they should cause his Body to be brought back to London, and there Buried by his Wife and Children. After the Testator dies either at York or on the Road. The Executors cause his Corps to be brought to London, and there Buried as he appointed in the said Codicil. The Funeral cost 60 l. I. G. demands the remaining 40 l. the Law will not give it him, because in the Codicil there is an Ademption of the Legacy express'd in the Will, and a Translation thereof to the Executors implied in the Codicil. (f)

15. In Cases doubtful the Presumption shall not be for an Ademption; (g) therefore where other Conjectures may be had, such Presumption shall cease: For which Reason, if the Testator gives his House to one, and after in the same Will give the same House to another; it shall not be Construed, as if he would take the House from the first, but rather that he would have them both Collegataries, unless there be very pregnant proof of the Testators intention to the contrary. (h) Otherwise if a Testator doth Devise a House to A. B. and after give the same House by Deed of Gift to C. D. in this Case the Devise to A. B. is Extinct. Or if after he Buys the same House of C. D. and dies, and A. B. demand the House, he cannot Recover it, unless he can prove that the Testator by a new Declaration of his Will intended he should have it. (i) Likewise if a Devise'd House be pull'd down, and another built by the Testator in the same place, the Devise is void, unless it can be proved that the Testator intended otherwise. (k)

16. The effect of an Ademption may also happen in defect of performance of some Condition charg'd on the Legatary; but a Condition depending meerly upon the Testator himself works no Ademption, in Case it be never performed. The Reasons in Law are, Because such a Condition, if deficient, shall be understood, as if the Disposition were pure and simple without any Condition at all; as also because such a Condition is not held as a Real Condition, but rather as the counterfeit thereof. For Instance, suppose the Testator in his Testament saith, [I Will that A. B. shall have 20 l. if I so order it in my Codicil, or if he doth what I shall there Appoint him.] The Testator dies without making any Codicil, or having made one, there appears nothing therein appointed by him for A. B. to do; he shall have the 20 l. notwithstanding such Condition, for the Reasons aforesaid. (l)

17. Another way whereby Legacies become void is when the Testator takes them from one, and gives them to another, which the Law calls Translation, and which is more than a bare Ademption

f) §. qui filio?
l. alumnae. ff.
eod.

g) l. 3. §. si duobus. ff. de adim. legat. & Bald. in l. si plurib. nu. 1. ff. de Legat. 1.

h) gloss. in l. ult. in fin. ff. de his quæ pœnz nonin. & Bald. in l. Cohæredi. §. Coheres in fin. ff. de vulg. & Pup. Subst.

i) gloss. in l. cum servus ff. de adim. Leg.

k) l. si ita Leg. ff. de Legat. 1.

l) l. si quis ita & gloss. ibid. ff. de hæred. instit.

m) Argum. &
Rub. in tit. de
adim. Legar.

n) gloss. in l.
ficut adimi.
ff. eod.

o) l. legarum.
& Gloss. ibid.
ff. eod.

p) gloss. in l.
fundo. & gloss.
in l. cum. cen-
tum. ff. eod.

q) dict. gloss.
& l. si quis ita.
§. cum. Titio.
ff. eod.

r) gloss. in l.
fundo. ff. de
adim. Legat.

tion thereof; for this doth only take it away, but that doth not only so, but gives it to another, or takes it from one that it may be given to another, or takes away one thing that another may be given; so that *Translation* compriseth in it *Ademption* and *Bequeathing*. (m) [What I gave to A. B. I do give to C. D. It is a *Translation* to C. D. implying an *Ademption* from A. B.

18. This *Translation* may be four ways, as either from one Legatary to another, or from one Co-executor to another, or from one thing to another, or from a pure, simple, and absolute Legacy to a Conditional one. (n) And it carries with it the same Conditions the Legacy had before it. *Translation*, unless it be such a Condition as is inherent in the person of the first Legatee: As if a Merchant-Testator should give in his Will 500 l. to his Son *John* then in the *Straights* upon this Condition, if his Ship shall safe arrive from the *Straights*. After he takes this Legacy from his Son *John*, and by way of *Translation* gives it to his Son *William* at home without any Reiteration of the said Condition, and dies: In this Case, and notwithstanding such Condition were not repeated in the said *Translation*, yet the Law implies it; and *William* cannot claim the 500 l. till the Ship returns. Not so, in Case the Condition were inherent in the person of *John* the first Legatee, as if the Testator had said, [I give my Son *John* 500 l. upon this Condition that he come home safe in my Ship from the *Straights*.] In this Case the Law will not imply the Condition as repeated in the *Translation* to *William*, which was necessary in the person of *John*. (o)

19. Suppose a Testator gives A. B. a House simply, purely, and absolutely; after in the same Will gives to the same A. B. the same House Conditionally; and after says, I would not have my Executor to deliver A. B. the House which I gave him Conditionally; In this Case the House is not due to A. B. on any account, unless the Testator had expressly added withall, that he would have him to have it purely and without any Condition. (p) Or if a Testator in his Will give A. B. 100 l. and in his Codicil 50 l. in which Codicil he saith, That he would not have his Executor to give him more than 50 l. In this Case there is an *Ademption* of 50 l. from the Legacy of 100 l. given to A. B. (q)

20. A Testator saith, I give my House to *John Styles*, and my Ground to *William Styles*; after in the same Will saith, [What I gave to *Styles* my Will is to have it taken from him.] And so it doth not appear, from which *Styles* he intended. In this Case the Devises are due to both the *Styles*; For if he had given a Legacy to *Styles*, and no Evidence of which *Styles*, the Law would have been, that it is due to neither; and therefore by paritie it shall in the other Case be due to both, (r)

21. A Testator gives 100 l. to his Daughter, saying withall, That if she will not Marry with A. B. it shall be taken from her, and given to him, and dies. After the Daughter also dies, and before she was capable of Marriage or qualified for consent there-to. In this Case the Legacy of the 100 l. is not Translated from her to A. B. because the Translation here seems to be threatned *Nonine pona*; and where there is no fault there ought not to be any Punishment. (r)

22. Legacies may be also void or voidable by reason of the Incapacity of the Legatary to take by a Legacy or Devise, and this may happen several ways. Generally whatever incapacitates an Executor for an Executorship, hath the same effect on a Legatary as to a Legacy. (r) But more particularly, if Capital and grievous Enmity happen between the Testator and the Legatary, That alone by the Naked or Tacite Will of the Testator, that is, without any solemn or expresse order from the Testator, is an Ademption in Law of his Legacy, but if they happen to be after Reconciled, the Legacy returns to its pristine validity, because every Mans Will is *Ambulatory* (so the Law phrases it) to the very last Moment. The Law is very clear in this Point, (u) which tacitely so understands it. (w) Yea, this holds true, albeit the Testator himself were the first cause of the difference between them; (x) because it is thence infer'd, that he hath changed his Mind: Yet the Law is not in this Point without its Restrictions; for it will not hold in all Cases, specially where the Legatary hath deserved well of the Testator, nor shall every light offence intervening work this Ademption. (y) But a Criminal Accusation will amount to this Capital Enmity: (z) And therefore if the Legatary shall accuse the Testator of some Capital Crime, he is understood as his Capital Enemy; and consequently the Law implies an Ademption of his Legacy. (a) Likewise the Law tacitely implies the same, in case the Legatary should tacitely commit a Trespass on the Testators Wife, (b) which is no less true in the Theory as to matter of Law, then common in the Practice as to matter of Fact. Likewise if the Testator Bequeath to his Wife, and she play the Whore, she forfeits her Legacy. (c)

23. By the way observe, That an Executor is not deprived of his Executorship by intervening Enmity between him and his Testator, as the Legatary is of his Legacy; for albeit whatever invalidates an Executorship, is equally fatal to a Legacy; yet this will not hold *visé versa*. For put the Case, That the Testator makes A. and B. his Executors, and Bequeaths to A. 100 l. After there arises very grievous Enmity between the Testator and A. the Co-executor and Legatary also: For which Reason the

s) l. sancimus. C. de pœnis, & Mant. de. Conject. ult. vol. lib. 12.

tit. 3. nu. 2. & Alij.

t) gloss. in l.

3. §. fin. ff. de adimend. Leg.

& l. ex part. tit. cod. &

Mant. de Conject. ult. vol.

lib. 12. tit. 4. nu. 2.

u) l. si inimi-citiz. ff. de ijs quib. ut indign.

w) l. 3. §. ult. ff. de adim. Leg.

x) l. 4. ff. de adim. Legat. &

Mant. lib. 12. tit. 5. nu. 9.

y) gloss. in l. fundo. ff. de adim. legat. &

l. si quis ira. §. non solum.

ff. cod.

z) gloss. min. lit. 2. in l. si-

lio. §. Scia. ff. de adim. Leg.

a) Ibid.

b) gloss. in l. fidei commiss.

in fin. ff. de Fi-dei V. Jason in l. (ororum, nu.

5. tit. cod.

c) Gloss. Bert. & alij Com-muniter, in di& l. fidei

commiss. ff. de fidei. & Bert. in l. 1. ff. de ijs

quib. ut indiga.

Testator

Testator Resolves upon making another Will, and to take from A. whatever he had given him. And having accordingly begun to make such second Will, dies before he could finish the same, or therein say any thing as to A. Whereupon A. as one of the Two Co-executors and Legataries, claims both a Moiety of the Testators Personal Estate, and the Legacy of 100 l. also. The Question is, whether he shall have both? It is answered Negatively; He shall have a Moiety of the Personal Estate, but not the Legacy; because a Legacy may be taken away by the bare and naked Will of the Testator, that is, by his Will Tacite and without any Solemn Formalities: But the Executorship not so. (d)

24. Add to this, That in Case the Legatary shall after the Testators death, in his own Name *decuse* the Testament of *Falsify*, he loseth his Legacy. (e) Likewise if he shall *Surreptitiously* get into his Custody the Testament, and *Conceal* the same, he loseth the Legacy therein Bequeathed to him. (f) Or if he *Cancels* the Testament, his Legacy is lost. (g) Or by his own *Authority*, without the Executors Consent or Delivery, shall usurp the Possession of what is Bequeathed him. In such Case he Forfeits his Right thereunto; (h) unless the Testator himself Licensed him so to do; (i) Or that he had it in his possession at the Time of the Testators death, there being Assets sufficient to pay his Debts; in which Case he may lawfully retain the Thing Bequeathed to him, without the Executors delivery thereof; (k) Or when he is as well Executor as Legatary; (l) Or lastly, when the Thing is Bequeathed to Pious uses. (m)

25. Again; unless the Legatary survive the Testator, the Legacy will not be due. (n) Otherwise, and if it be not Conditional, nor made payable at a future time certain, it will be due immediately upon the Testators death. (o) Therefore if the Legatary die before the Condition performed, or the day for Payment be come, the Legacy is lost, (p) if that Time werelimited not to a day certain, but uncertain. (q) Otherwise, and the day be certain, though the Legatary dies before it comes, the Legacy shall accrew to his Executors, for in that Case the Legacy was due at the Testators death, though not payable till that day certain be come. (r) But if the day or time be altogether uncertain, the Legacy is then as if it were Conditional; (s) And the breach or non-accomplishment of a Condition in it self Lawfull and Possible, doth either suspend or extinguish the Legacy. And as to that frequent Condition relating to Marriage so commonly an-

d) gloss. in l. ex parte. ff. de adm. Legat. Ratio est, quia Instit. hared. (h. e.) Executors, est Caput Testam. gloss. in ibid. e) l. post Leg. ff. de his quib. ut indign. f) l. si Legatarius. & l. si Paul. Castren. in Summ. C. de Legat. g) l. si quis cum falso. §. Divus. & l. si quis pater. ff. ad leg. Corn. de falsis. h) l. non datum. C. de Leg. i) Richard. in dict. l. non dubium. & Perk. tit. Testam. fo. 94. j) Part. in l. Titio. §. Lucius ff. de Legat. 1. & alij. k) Socin. Con. ejl. 1. l. 1. & Olden de Afficion. class. 2. Afficion 1. fo. 113 l) Richard. in dict. l. non dubium. nu. 13. m) Tirag. de privileg. piz. Cause. cap. 46. (n) l. si post. ff. quando dies leg. ced. (o) l. unie. §. cum igitur. C. de cad. tollend. (p) l. in hereditate. ff. de Cond. & Demond. (q) l. dies incertus. ff. cod. (r) l. cedero diei. ff. de verb. sig. (s) dict. l. dies incertus.

nexed to the Execution of a Legacy it is not Impertinent here to insert. That albeit a Condition absolutely against Marriage, is unlawfull, yet not so if it be only against Marriage with such or such a Person, or with such kind of Persons; and therefore the Condition is good, if the Testator gives his Daughter 100 l. under this Proviso, That she Marry with a Merchant, or a Merchants Son, otherwise the Legacy to be void; In which Case if she Marry first with a Merchant, and after his decease with another who is not a Merchant, nor a Merchants Son, she shall loose her Legacy. (1)

26. Lastly, The Legacy is but equivalent to a Cypher by the voluntary waiver and refusal of the Legatary declaring his dissent thereunto; as also by the Actual and total destruction of the Thing it self Bequeathed; for if neither the Quantity nor the Quality thereof can appear, the Legacy is void. (2) Hence it is, That the Bequest of a Debt is void, if Payment thereof be made to the Testator in his life time; otherwise if after his death it be paid by the procurement of his Executor. (3) But if the Testator himself doth exact the Debt, the Legacy thereof is extinguish'd. (4) Otherwise if paid to the Executor, by whose default if any other thing Bequeathed doth perish, it shall be no loss to the Legatary; (5) nor any loss to him, in Case the Legacy be something in general, as a Horse or an Oxe, not saying which; or in Case the Legacy consist in Quantity, as so many Bushels of Corn; not saying of what Grain, or in what Garner or Granary; In which, and other like Cases the Legacy is not void, albeit the Thing so Bequeathed shall utterly perish. (6)

Upon Evidence in Trespass, the Case was, A. made his Will in writing, and thereby Devise'd his Lands to E. H. and her Heirs, and afterwards lying sick, because the said E. H. did not come to visit him, he Affirmed, That E. H. should not have any part of his Lands or Goods; It was the Opinion of the Court, That it was no Revocation of the Will, being but by way of Discourse, and not mentioning his Will: But the Revocation ought to be by express words, that he did Revoke his Will, and that she should not have any of his Lands given her by his Will.

Lands Devise'd by Will to one, and after a Feofment thereof made by the Devisor to another; the said Devise is Revoked by such subsequence Feofment. As in the Lord *Bourchers* Case, touching his Will made 23. H. 8.

Note, By all the Justices, upon an Evidence to the Jury in an *Ejectione Firme*, That if a Man hath a Lease, and disposeth of it by his Will, and afterwards surrenders it up, and takes a new Lease, and after

(1) Man. de
Cohle. ult.
Vol. lib. 11. tit.
18 nu. 3.

(2) l. si sic. §.
1. ff. de Leg. 1.
& l. Titia. in
prin ff. de Leg.
2. & l. cum post
§. gener. ff. de
jure dotis.

(3) l. si is quod.
ff. de Liberat.
Legat.

(4) §. tam au-
tem corpora-
les. Inst. de
Leg. & l. si sic.
§. 1. in fin. ff. de
Legat. 1.

(5) Paul. de cast.
in l. servum si-
lij §. si pocula.
ff. de Leg. 1. &
l. senatus. in
tit. cod.

(6) l. incend.
C. si cerpe. &
Inon amplius.
§. 1. ff. de
Legat. 1.

Pasch. 4. Jac. in
B. R. *Kyrton* &
Simpsons case.
Cro. 2. part.
115. & Hugh.
Abr. ubi supra.

Trin. 6. E. 6.
Dyer. 74.
Hughs. ibid.

Trin. 30. El. in
C. B. *Abbey* &
Livers case.
Goldesb. 93. &

Hugh. *ibid.*
Vol. 3. tit. Re-
vocation.
Mich. 31. E.L.C.
B. Goldesh.
109. 110. vid.
Cook. 4. part.
61. Forfe &
Memblins case.
& Hugh. *ibid.*

after dyeth; That the Devisee shall not have this last Lease, because this was a plain Countermand of his Will.

A Feme Sole was Seized of Lands in Socage, and by her last Will Devised them to I. S. in Fee, and afterwards she took the Devisee to Husband, and during the Coverture she Countermanded her Will, saying, That her Husband should not have the Land, nor any other Advantage by her Will. It was Adjudged upon great deliberation that it was a Countermand of the Will, the words being spoken after Marriage; for the making of a Will is but the Inception thereof, and takes not Effect till the Devisors death.

Mich. 2. Jac. in
C. B. Cook &
Bullocky case.
Adjudg'd acc.
Cro. 2. part. 49.
& Hugh. Abr.
ibid.

One Devised Lands to his Sister in Fee, and after made a Lease to her for Six Years of the Lands to begin after his Decease, and delivered it to a Stranger to the use of his Sister; which Stranger did not deliver it to her in the Testators life time, and she Refused, and Claimed the Inheritance. In this Case it was Resolved, because the Devise and the Lease made to one and the same Person, beginning at the same time cannot stand together in one and the same Person, That it was a Countermand of the Devise. But it was there Agreed by all the Justices, That if the Lease had been made to any other than the Devisee, they might stand together, and the Lease should not have been a Revocation of the Will as to the Inheritance, but only during the Term.

Mich. 16. Jac. in
B. R. Cranvill &
Sanders case.
Cro. 2. part.
487. & Hughes
ibid.
Mich. 5. Jac. B.
R. Webs case.
Adjudg. Roll.
Abr. tit. De-
vise. lit. D.
Mic. 1. Jac. B. R.
Goodwyn &
Goodwins
case. Yelv. Rep.

In an *Ejectione Firme* upon Evidence to a Jury. It was Resolved by the whole Court, That if one maketh his Will in Writing of Lands, and afterwards upon Communication saith, That he hath made his Will, but that shall not stand. Or I will Alter my Will, &c. That these words are not any Revocation of the Will, for they are words but *in futuro*. But if he saith, I do Revoke it, and bear witness thereof, hereby he absolutely declares to Revoke it *in presenti*; and it is then a Revocation. And in this Case it was Agreed by the Justices, That as one ought to be of good and *sane Memoriae* at the disposing, so he ought to be of as good and *sane Memoriae* at the Revoking of it. And as he ought to make a Will by his own directions, and not by Questions: So he ought to Revoke it of himself and not by Questions.

If a Man Devise 20 *l.* to the Poorest of his Kindred, it is void by Reason of the uncertainty whom the Court shall judge the Poorest.

A Legacy of 20 *l.* given by a Testator to his Daughter, to whom his Executor gave Bond in 40 *l.* for payment thereof according to the Will. The Daughter takes Husband, who sued the Executor in the Ecclesiastical Court for the Legacy. The Executor

Executor pleaded payment according to the Bond; and because the Ecclesiastical Judge would not allow the Plea, the Executor brought a prohibition, shewing by way of surmize the matter aforesaid. *Tanfield* Serjeant moved for a Consultation, because the Suit was for a Legacy, which is of Ecclesiastical Cognizance: And albeit the Executor pleaded Payment, which is not there allowed, yet he ought not to have a prohibition, because Payment is a good Plea in that Court; and if the Judge there will not allow it, the other may appeal to the Superiour Judge; and if this should be suffered in the Case of a Legacy, then the Ecclesiastical Court should trie nothing. But (according to *Gandy, Fenner, and Yelverton, Justices*) the Surmize is good; for the Executor by entring into Bond to the Daughter for Payment of the Legacy, had Extinguish'd the Legacy, and had made the 20 *l.* Devise'd a Debt, Stable merely at the Common Law, and not there.

A Stranger Disseises the Devisor, if he die before Re-entry, the Devise is void. 39. H. 6. 18.b. Roll. Abr.

If there be divers Devises of one thing in the same Will, the last Devise shall take effect. *Co. Lit. 112. b.* Rol. ibid. lit. T.

If a Man Seised in Fee Devise the same to *L. S.* in Fee, and afterwards makes a Lease thereof to *J. D.* for Years, this is no Revocation of the Fee, but only during the Years: Also, if afterwards he devise that Lease to another for Life, yet that is not any Revocation of the Fee, but only during the Estate for Life. Mich. 38, 39. Et. B. R. inter *Mountague & Jeffries* Agreed per Car. & Council. Rolle. ibid. lit. V.

If a Man possessed of a Term for 40. Years, Devise the same to his Wife, and after Lease the Land to another for 20. Years, and die; that Lease is not a Revocation of the whole Estate, but only during the 20. Years, and the Wife shall have the Residue by the Devise. 16. El. B. Wilcocks case. per *Gawdry* Roll. ibid.

It appears therefore, that a Legacy may indirectly, and by Implication be Revoked, as well as directly and expressly; also in part as well as in whole; and the Will may stand where Legacies in that Will do not.

In a Replevin upon Evidence given, the Case was this. *I. W.* was Seised of the Lands in Question, and of divers other Lands; and by his last Will Devise'd all his Lands and Tenements to *A. W.* of London in Fee. After which he made a Feoffment in Fee of the same Lands which he had Devise'd to the said *A.* and when he Sealed the Feoffment, he demanded and said, will not this hurt my Will? To which it was Answered, That it would not: And he said, If this will not hurt my Will, I will Seal it, and then he Sealed it, and a Letter of Attourney to make Livery: The Attourney made Livery in some of the Lands, but not in the Lands in Question; afterwards the Testator dyed. It was said,

Tt

That

Mich. 29 Elia.
B. R. Gibson &
Platleffe's
case Goldesb.
32, 33. vid.
Owen 76. the
same Case.
Hugh's Abr.
verb. Wills and
Testaments.

That the Feofment was a Revocation; for if the Testator had said, That this shall not be his Will, then it had been a plain Revocation, and then the making of the Feofment is as much as to say, That the Will shall not stand. But it was Answered, and Resolved by the whole Court, That it Appeared, That the mind of the Testator was, That his Will should stand, and when he made the Feofment, this was a Revocation in Law; and here is no Revocation in Deed; For he said, If this will not hurt my Will, I will Seal it: And although that the Attourney made Livery in part, so as the Feofment was perfect in part; yet for the Lands in Question, whereof no Livery was made, the Will shall stand; for a Will may be effectual for part, and for part it may be Revoked; and the Court told the Jury, That this was their Opinion, and the Jury found accordingly.

The Case in *Chancery* was this, C. E. the Testator, 15. *Jac.* made his Will in Writing, and thereby Devised Legacies to Charitable Uses, and to R. and W. his Brothers, viz. to one 100 *l.* and to the other 1000 *l.* and other Legacies to his Kindred; and made his Wife his Executrix, and Appointed his two Brothers to be joyned with her as Executors in Trust for his Wife; afterwards 22. *Jac.* he sent for several Persons to come to him; when they came, they demanded of him, What Friend he thought best to be his Executor, and to see his Will performed? and whether he Truſted any Person more than his Wife? He Answered, That his Wife was the fittest Person, and therefore should be his Sole Executrix. Being then moved to give other Legacies to his Father, Brethren, and Kindred; He Answered, He would not leave them any thing, But Bequeathed to I. S. his God-son 30 *s.* And being Requested by his Wife to give him a greater Legacy; He Answered, Thou knowest not what thou doest; do not wrong thy self; 30 *s.* is Money in a Poor Bodies Purse: And the Testator spake these words, *Animo Testandi, & ultimam voluntatem declarandi.* And all this was set down in a Codicil: And the first Will and the Codicil was proved in *Communium forma.* Whether this Codicil was a Revocation of the Legacy given to the Two Brothers, was the Question, It was Resolved both by the Civilians, and by the Judges of the Common Law, That it was not a Revocation of the Legacies. Their Reasons were, Because there was an Absolute Formal Will made in his Health, and there being no Speech made by him of his Formal Will, nor of the Legacies thereby Devised. The Answer to a Doubtful Question shall not take the Legacies before Devised: And his Answering, I will not give them any thing: Upon such Doubtful Speeches to Nullifie a Will advisedly made shall not be permitted, without clear and perspicuous Revocation, or words that
do

do amount to so much: And thereupon upon this Opinion of the Civilians and Judges, the Lord Keeper Decreed the Legacies to the Brothers, the Codicil having made no Revocation of them.

Mich. a. Car. in
Chancery.
Eyras & Eyras
case. Cro. 1.
Par. 37. & Hug.
Abr. verb.
wills, &c.

C H A P. XXVL

Certain Positions or Assertions of Law for the better understanding of this Subject of Legacies and Dewises, with certain mixt Cases touching the same.

1. **I**F the words of the Legacy be Doubtful or Ambiguous, the Motive inducing the Testator, or the Cause of the Legacy is specially to be inspected. (a)
2. In Cases Doubtful whether the Legacy be given Absolutely or Conditionally, it shall be presumed as Pure, Simple, and Absolute, rather than Conditional. (b)
3. In a Legacy Doubtful as to its value for want of some discriminating description thereof by the Testator, that which is of the least value, belongs to the Legatary. (c)
4. Likewise in all Dubious Legacies as to the Quantity thereof, the least is generally to be understood. (d)
5. A Doubtfull Legacy relating to Goods, shall be understood of such only as the Testator had at the making of the Testament, for the clearing whereof the Law casts the *onus probandi* on the Legatary. (e)
6. Where the Doubt arises from the Testators words, the Ambiguity shall be interpreted in favour of the Legatary. (f)
7. In the Interpretation of Legacies the common usage of Speech is more to be considered, than the exact propriety of the words. (g)
8. Also the Testators sense and meaning is more to be considered than his words. (h)
9. The Testators words are to be understood rather as he thought then as he spake or writ, that is, the effect of the Testament is guided, governed and over-ruled more by the Testators Opinion, than as things are in themselves. (i)
10. When the Testators words of Bequeathing seem to interfere one with another, the latter words shall for the most part

a] Rub. in l.
uxorem. ff. de
Legat. 3.

b] gloss. min.
lit. b. in §. cum
ita l. ut hared.
ff. de Legat. 2.

c] l. si ita. sic. &
gloss. ibid. ff. de
Legat. 1.

d] l. qui con-
cubinam. §.
cum ita Legat.
ff. de Legat. 3.

e] l. si ita. ff. de
aur. & arg. leg.
& Bald. in l.

ult. §. ult. nu. 2.
vers. item si
Test. C. de Ap-
pel.

f] Mantie. de
Conject. ult.
Vol. lib. 7. tit. 1.
nu. 32.

g] Anchor. q.
2. lib. 3. nu. 6.

h] gloss. in l.
fundo. ff. de
adim. legat.

i] gloss. min. lit.
a. in l. quo loco.
ff. de hared.
Instir.

l. gloss. min.
lit. l. si mihi &
tibi. ff. de Leg.
1.

l. gloss. mag.
lit. a. nam &
cum. in dict. l.

m] l. si in Test.
ff. de Legat. 1.

n] l. uxorem. §.
Testam. ff. de
Legat. 3.

o] Rub. in l.
pater filium.
ff. de Legat. 3.

p] l. ibid. §. vi-
cos. 33. ff. de
Legat. 2.

q] dict. l. cum
pater. §. 24.
ff. de Legat. 2.

r] Bart. in dict.
l. ff. de Leg. 3.

s] l. hæc verba.
& gloss. ibid. ff.
de Legat. 1.

t] l. Stichum.
ff. de Legat. 1.

u] l. cum pecu-
nia §. quod ita.
& gloss. min. &
Bart. ibid. ff. de
Legat. 2.

w] Inst. de
hæred. just. §.
impossibilis. &
gloss. in §. in
Testam. l. ab
omnib. ff. de
Leg. 1.

prevail. (*k*) Yet not always so; there are some Cases wherein
Contrarium verum est. (*l*)

11. When the Testators mind and meaning is not as intelligi-
ble as it should be, hold his words before the Glass of the Law
to make it as visible as it may be; the Law is the best, and indeed
the only interpreter in all such Cases.

12. An imperfect Speech in Bequeathing a Legacy may be re-
duced to such as is Equivalent to that which is perfect, if the Te-
stators mind and meaning may rationally be presumed. (*m*)
For Instance. The Testator saith, [Let 10 l. to A. B.] without
the words [be given.]

13. Words of the Present Tense used in the form of a De-
vise, are ever to be limited to the time of making the Testa-
ment. (*n*)

14. A Legacy may pass by Implication, as well as by expressi-
on; and a Devise may be as well inferr'd from the Testators In-
tention, as from his Verbal Disposition. (*o*)

15. A Bequest is good, albeit the Quality or Description of
the thing Bequeathed, (which the Testator had said in his Will he
would there insert) be omitted, provided the thing Bequeathed
be not left at uncertainties. (*p*)

16. Words spoken by a Testator by way of Council, annexed
unto, or innerwoven with words Bequeathing a Legacy, do
not import any Condition as thence charging the Legatary there-
with. (*q*)

17. A Condition of Non-alienation annexed to a Devise, is
not to be extended to such an Alienation, as is absolutely
necessary and unavoidable, but only to such as is merely volun-
tary. (*r*)

18. A necessary Condition annexed to a Legacy doth not
make it Conditional; as if the Testator having appointed A. B.
his Exccutor, shall after say. I give I. G. 100 l. if A. B. be my
Exccutor. (*s*)

19. Pronowns Relative, (as who, which, or the like) joyned
with a Word of the Future Tense in a Bequest, do imply a
Condition. As thus, the Testator saith, [That A. B. who
shall be my Exccutor when I die; shall give C. D. 100 l.] which
is, as if he had said, [if A. B. be my Exccutor, he shall give C.
D. 100 l.] (*t*)

20. Likewise a day uncertain set for the Payment of a Lega-
cy, makes it a Conditional Legacy. (*u*)

21. An impossible Condition imposed upon a Legatary, shall
not hurt him in his Legacy. (*w*) Albeit the Testator thought it
Possible. *l. servo ff. Con. Ind.*

22. A Legatary cannot transfer his Legacy, if he die depending the Condition. (x)

23. That Condition needs no Expectation, whose Event hath no Operation. (y)

24. A Legacy taken away under a Condition, is understood as given under the contrary Condition. (z) As if the Testator saith, [A. B. shall not have 100 l. if my Ship which I expect home, should chance to perish in the Sea.] In this Case A. B. shall have 100 l. if that Ship shall safe arrive.

25. The Legataries Legacy is not Transmissible to his Executors, if he die before the accomplishment of the Condition thereunto annexed. (a)

26. Every Condition relating to a Legacy ought to be understood so, as may admit a possibility of both Existence and Non-existence. (b)

27. To find out the mind of the Testator, and to reach at the very Truth of the Meaning, Respect must be had rather to the Time of his making the Testament, than to the Time of his death. (c)

28. The Testators meaning in all probability is best interpretable by reflecting on his usual Mode, and common Custom of speaking. (d)

29. All Dispositions made by a Testator must be understood under the Qualification of *Rebus sic stantibus*. (e)

30. The Testators Will ought to have such due Construction, as may enure rather to the validity than nullity of the Dispositions therein made by him. (f)

31. To prevent the Inutility of such Dispositions made by the Testator, he shall be presum'd (if possibly the Case will bear it) to have in his thoughts what is not contained in his words. (g)

32. A Legacy of Release or Discharge to Debtors, is not Extensive to other than were Debtors at that time when the Testament was made; unless the Testator Expressly Bequeath it otherwise. (h)

33. To the Payment of an Annuity Bequeathed in a Will, it is sufficient if the last Year were but newly begun when the Legatary dyed. (i)

34. In Legacies of a perishable Nature or Quality, that interpretation ought to be made, which may best prevent the destruction or peioration of the Thing Bequeathed. (k)

35. Impossibility destroys a Legacy. Understand it of such a Moral Impossibility as was such *ab initio*, and not of such as are so by some Post-fact of the Executor that should pay the same.

x) C. de cadu tollend. §. fin autem. & gloss. min. l. miles. ff. de Legat. 2.
y) l. si quis ita. ff. de hered. inst.
z) l. si legatum pure. & l. legata inutiliter. ff. de adm. Leg.

a) l. intercidit. ff. de cond. & demon.
b) l. ex facto. §. ult. ff. ad Treb.

c) Roman. in Authen. similiter. nu. 93. in fin. ad l. Falcid.
d) l. si servus plurium. §. ult. ff. de Legat. 1.
e) Barr. in l. quoties. §. si duo. §. ult. ff. de hered. instir.
f) l. quoties & l. ubi est. ff. de reb. dub.

g) Barr. in l. quintus. §. 1. nu. 3. ff. de aur. & arg. leg.
h) l. Aurelius. §. 1. ff. de Lib. Legat. & Fulg. Conf. 37.
i) l. a vobis. Rub. ff. de Annis. Legatis.
k) gloss. min. lit. c. l. si ita quis ff. de Legat. 1.

[j] gloss. min.
lit. 6. in l. 6.
Creditori. ff.
de Legat. 1.

m) l. plane. §.
fed ff. gloss.
ibid. verb.
Divus Pius. &
verb. ostenda-
tur. & gloss.
min. Lit. ff.
de Legat. 1.

n) l. cum servus
§. si vero. &
gloss. mag. &
min. ibid. ff. de
Legat. 1.
o) l. cetera.
ff. cod.

p) C. de pign. l.
Creditores. &
gloss. in l. Lu-
cius. ff. de
Legat. 1.

q) Bart. in Rub.
& gloss. min.
in §. civibus.
l. Lucius. ff.
de Legat. 2.
r) Rub. in l.
Nomen. ff. de
Legat. 3.

s) gloss. min.
lit. 2. in l. ex
facto. ff. de
hæred. Instit.

t) Rub. in l.
cum servus. ff.
de adm. Leg.
& gloss. ibid.

u) l. illa Insti-
tutio. ff. de
hæred. Instit.
w) dict. gloss.
in l. ex facto.

36. The Bequest of a Debt to be due at a day yet to come, is good to the Legatary though the day of Payment comes before the day of the Testators death. (l)

37. The *Onus probandi* doth not lie upon him, who hath the Presumption of his side, and such Presumption as is not disproved, or whose contrary is not proved; and therefore if the Testator Bequeath the same Sum of Money more than once to the same Person, the Legatary if he would have it twice, must prove it was the Testators meaning to have it so. (m)

38. Things not Merchandable are not Devisable: Understand it specially of things Sacred or Consecrated. (n) Nor things joyned to an Edifice, otherwise than as the Edifice it self. (o) In resemblance to what we hold for Law when we say, That things fixed to the Freehold go not to the Executor, but to the Heir.

39. The Testator may empower the Legatary to Assume his Legacy of his own Authority; (p) otherwise he may not so do, but must have it by the Executors delivery.

40. If a Bond or Obligation of a Debt be Bequeathed, the Executor is discharged by delivery of the same to the Legatary, and by yielding his Name and Authority for the putting of the same in Suit in order to a Recovery thereof for the Legataries use; but is not obliged to make the Debt good to him, in Case the Debtor prove insolvent. (q)

41. In the Bequest of a Bond or Obligation is Comprized both the Principal Debt, and such Interest also as is due on the same. (r)

42. Where there is a limited Executor, and another with him as universal Co-executor, that other in Construction of Law is Legatary as well as Executor. (s)

43. A Legacy once extinct by the Testators own Alienation thereof, though after Repurchased by the Testator, is never Recoverable by the Legatary without due proof of a Declaration *de novo* of the Testators intention to the same effect. (t)

44. The Testators Will depending on another Mans, is no Will. (u)

45. The Reason of the Law, That *Prius solvi debet as alienum quam Legata*. (w) That Debts must be paid before Legacies, is because the one is a necessary Duty, the other a voluntary Bounty.

46. If a certain Quantity be twice Bequeathed, it is twice due, unless the last Will of the Testator were expressed with an intent of Ademption of the first. (x) Understand this when it

is in two Distinct Writings, as in a Testament and a Codicil: For the twice Bequeathing to the same Person the same Quantity in the same Writing doth not Duplicate the Legacy; otherwise if it be in Two such Distinct Writings as aforesaid. (y)

47. The Testators Erroneous Demonstration or Description of the Bounds, Limits, or Scituation of Lands Devised by him, doth not prejudice the Devise, provided he be not mistaken in the Land it self. (z)

48. The Testators false Demonstration of the Thing Bequeathed, doth not hurt the Legacy, so as his Intention be Evident. (a)

49. If a Testator Bequeath part of his Goods to A. and saith not what part, the Legatary shall have a Moity of the whole. (b)

50. If the Testator saith, I give thee a part of my House, or the like; it is as if he had said, I give thee one half of my House. (c)

51. There falls no more under the Notion of Goods, than what the Testator hath clear of his Debts. (d)

52. If I give 10 l. to A. and B. they shall have 10 l. between them, not 10 l. each. (e)

53. If a Man Bequeath all his Horses, his Mares are comprized therein. (f)

54. By a Bequest of Lambs are understood such as are under a year old. (g)

55. By a Bequest of Cattle do pass all Four Footed Tame Beasts, that feed in Herds, Drovers, or Flocks, or otherwise. (h)

56. Although Mares pass (as aforesaid by a Bequest of Horses, (i) yet not *contra*; nor by a Bequest of Geldings.

57. Nor by a Bequest of Sheep do Rams or Lambs pass; yet in that Case the Custom of the Place is to be observed; for in some places they are reckoned as Sheep as soon as they are shorn; notwithstanding both Rams and Lambs shall pass by a Bequest of a Flock of Sheep. (k)

58. By a Bequest of Wooll is understood not only that which is sepearte from the Skin, but also such as is yet on the Skins of dead Sheep, wash'd or not wash'd, so as it be not yet dyed, nor designed for some special or particular use. (l)

59. By a Bequest only of Wooll do pass the Skins also of dead Sheep whereon the Wooll is. (m)

60. By a Bequest of Birds do pass all Poultry, Geese, Pheasants, and all Tame or Tamed Fowl. (n)

x) Rub. in l. cum centum. ff. de adim. Legar.
y) ibid. gloss. min. lit. a.

z) l. parthous. § sempronius. gloss. min. lit. b. ff. de Legat. 3.
a) Inst. de Leg. §. huic & gloss. in §. quod si. l. si sic legat. ff. de Legat. r. b) gloss. in l. si Titius. ff. de Legat. 2.
c) gloss. de verb. sign. l. nomen. §. portionis. & gloss. mag. min. in l. Titius. ff. de Legat. 1.
d) gloss. in l. cum autem. ff. de Legat. 1.
e) l. si quis test. & gloss. ibid. ff. de Legat. 1.
f) l. Martianus. ff. de Legat. 3. & Cal. Lex. verb. Legat.
g) l. cum quereatur. ff. de Legat. 3.
h) l. legatis §. Pecoribus. ff. de Leg. 3.
i) dict. l. §. equis.
j) l. servis. §. Ovium. ff. de Leg. 3.
k) Rub. & l. si cui lana. ff. de Leg. 3. & gloss. ibid.
l) dict. l. §. sed an pelles.
m) Rub. in dict. l. si cui lana.

61. By a Bequest of Wood or *Lignum* is only understood Fuel fit for the Fire, not *Silva*, or Trees standing or cut, nor Timber fit for Building, which pass by the word [*Materi- als.*] (o)

o) l. ligni. & glo. ibid. ff. de Leg. 3.

62. By a Bequest of Books are only understood Printed Volumes, not clean Paper-Books. (p)

p) l. librorum. & glo. ibid. ff. de Leg. 3.

63. By a Bequest of Silver will pass Money and Plate, but not the Chest wherein the Silver is. (q)

q) l. argento. ff. de Legat. 3.

64. By a Bequest of a Bond, Obligation, or Specialty doth pass the Debt therein contained, & vice versa. (r)

r) l. qui chirographum ff. de Legat. 3.

65. When a Testator Bequeaths a thing in certain; but having more of the same kind, which he meant, is uncertain; in such Case the Executor, and not the Legatary hath the Election; as when the Testator having but two Horses in all, gives one of them (not saying which) to A. B. the Executor, and not he shall have the choice. (s)

s) l. si quis a filio. § si quis plures. & gloss. ibid. lit. a. verb. Elegerit. ff. de Legat. 1.

66. Likewise when the Testator Bequeaths any thing Real and Immoveable in Certain, as his Field called *Blackdown*, when he hath two Fields of that Name; in this Case also the Election belongs to the Executor; to give unto the Devisee which of them he please. (t)

t) l. legato. & gloss. ibid. ff. de Legat. 1.

67. But when the Legacy is of Generals, or Bequeathed in General, as a Horse, an Oxe, or the like; in such Case the Election is the Legataries, to chuse only in a way of Mediocrity. (u) For,

u) dist. l. legato

68. When even by the Testators own words the Law gives the Election of the thing Bequeathed to the Legatary, it is not intended that he shall chuse that which is the very best for himself, and the very worst for the Executor, but shall moderate and regulate his choice between them both. (w)

w) gloss. mag. & min. in §. si quis plures.

69. But when the Election is Doubtful, as whether it doth belong to the Legatary or to the Executor; In that Case the Law in favour of Wills gives it to the Legatary. (x)

x) l. si quis a filio. ff. de Leg. 1.

70. A Legacy left by a Testator to his Parish Church, who after the making of his Will doth change his Habitation, is due not to the Parish where he dyed, but where he lived when the Testament was made; (y) which yet is contradicted, as will speedily appear.

y) gloss. min. lit. c. in l. qui duos. ff. de Legat. 1.

71. The words [*Si, Donec, Quamdiu,*] and the like, used in the Form of a Bequest, though they seem to be of no great disconsonancy in their import, yet do exceedingly alter the Case according to the diversity of their genuine acceptations; for a Testators Relict having a Legacy given her of 10 *l. per annum* if she shall remain a Widdow, is obliged to give Caution for Repayment (in Case she Re-marry) of what in the interim she shall

z) Roman. in Auth. similis. nu. 93. C. ad l. Falcid. per l. si cognatis. ff. de reb. dubijs. & l. peto. §. fratre. ff. de Leg. 3.

shall receive by vertue of that Legacy. (z) otherwise if the words were, [untill she shall be Married, or so long as she shall remain unmarried.] In both which Cases she shall only loose it *de futuro*, but not be obliged to repay what she received *de preterito*. (a)

2) Auth. cui relictum. de iudi. vidui. tollend.

a) l. Filiz. ff. de annuis Leg.

73. It is possible that a Legacy may be good, even wherethe Form of a last Will or Testament is not observed; for a Souldier being abroad in Military Service, wrote home to his Sister that he should speedily send her a Letter, which he desired and charged her not to open untill he were dead. Accordingly soon after he sends her a Letter which she preserves without opening. The Souldier is slain in the Wars. After she opens the Letter, wherein was found written to this effect, That he would give her 100 l. It is a good Legacy to the Sister. This also holds true in private persons; nor is it material whether he be Absent or Present, that thus writes, (b) provided it be *animo Testandi*, and without any Revocation subsequent.

b) l. miles. & gloss. ibid. ff. de Legat. 2.

74. There are a few Cases wherein a Legacy is not Revocable, Four especially. (1) When the Testator Swears never to Revoke it. (c) (2) When it tends to Restitution for Goods ill gotten, or wrongfully taken and withheld. (3) When the Testator gives it for the disburdening of his Conscience. (d) (4) When the Testator confesseth in the presence of the Legatary accepting it, that he owes him the Sum which he hath Bequeathed him. (e) There are also, that add a Fifth, viz. When the Testator himself in his life time delivers the thing Bequeathed to the Legatary. (f) But this the Law understands more properly as *Donatio inter vivos* than *Legatum*; yet if such Legacy be mentioned in the Testament (as it must be, if the Legatary hath it under that Notion) and such Testament afterwards prove Null, that Legacy will be so also; the Reason is, because such delivery thereof by the Testator alters not the nature of a Legacy, and will be understood to be with an *Implicite Referendo* to the Testament it self. (g)

e) Maschard. de probat. concl. 359. nu. 8. 19. & l. cum quis decedens. §. Codicillis. ff. de Legat. 3. d) Idem. Conc. dist. nu. 21.

e) Alex. Conf. 153. in fin. lib. 2. Conf. & ibi Molin. & Maschard. ibid. f) Aymon. Cravert. sup. Rub. de Legat. 1. post Barr.

g) Cravert. ibid.

75. If the Testator in his Will doth Appoint, That whatever he got by Extortion, or any unlawfull ways, shall be restored, without expressing what or to whom) it signifies nothing by reason of uncertainty; (b) and which indeed is more a Debt than a Legacy. (i)

b) Lqui Rom. §. Augerius. ff. de verb. obl. & l. si cui. §. Flav. ff. de solutio. i) Ibid.

76. A Legacy left to one if he will, the Testator in the Bequest saying expressly, I give A. B. 100 l. if he will accept of it; in such Case the Legacy is lost, if the Legatary knowing thereof die before he hath declared his Will or Acceptance. (k) The Reason is, because the Legataries Will, and consequently the power of accomplishing the Condition is not Transferrable to another. For,

k) L si ita legat. §. illi si volet. ff. de Legat. 1. & l. si ita expressum. ff. de

1) l. unica. §. fin.
autem. C. de
cad. tollend.

m) Car. Tap. in

l. Beneficium.

ff. de const.

Prin. nu. 13. & l.

nec semel. §. 1.

ff. quando dies

Legat. ced.

n) Petr. Bella-

pert. in ff. si qui

cautio judic.

caus. fac. non

otemp. l. si

quis post tres.

nu. 24.

o) l. cum ira. §.

in fidei com-

missio. ff. de leg.

2. & Jo. Ant.

Rubens. in §.

quidam recte

l. Gallus Aquil-

lius. ff. de Li-

ber. & posth.

p) gloss. in l.

Lucio Titio.

ff. de Legat. 2.

& ibi Bart.

Alber. Bald.

Imola. Paul.

Angel. satie. las.

cum mult. alij.

q) Bald. in

pract. tit.

de ult. Vol. q.

12. nu. 2.

r) Barr. in l. quæ

Conditio. §.

cum ira. ff. de

Cond. & Dem.

s) Panorm. in

cap. nos qui-

dem. nu. 13. de

Testa. & Lapsus.

in Alleg. 87. nu.

6. & Felin. in c.

disiectus. col. 1.

& Troilus Mal-

vetius in Tract.

de oblat. par.

4. nu. 3.

t) Jo. Andræ.

5) Mentoeth. lib. 4. Præf. 114. nu. 6.

77. The Legatary cannot Transmit his Legacy to his Executor or any other before the day of payment thereof come. (1)

78. An Annual Legacy, or a Legacy of an Annuity is payable at the beginning of Every Year, unless the Testator doth otherwise fix the times of payment. (m)

79. A Legacy left at a day uncertain when it will be, but certain that it will be, is not due unless the day happen in the Legataries life time. (n)

80. A Legacy given by the Testator to his Kindred in general, is due to such as were not of Kin to him at the making of his Will, so as they be of his Kin at his death. (o)

81. In an alternative Legacy, wherein the Executative words are directed neither to the Executor nor to the Legatary, as when the Testator saith, [I give my House or 100 l. to A. B.] the Election belongs to the Legatary, not to the Executor. (p) The Reason is, because the Law so favours Testaments, as that they shall be interpreted with as Extensive a Latitude as possibly may consist with the Testators mind and meaning.

82. If the Testator saith, I Bequeath or Commit my Estate as well as my Soul to God.] Whoever hath his Soul, his Parish Church shall have his Estate. (q)

83. If the Testator in his last Will doth give 100 l. to the Church, (without other description thereof) and had but one Parish Church, it shall be intended of that, if he dwelt in that Parish. (r) If he gave it to St. Stephens Church in such a City, by Name, and none there found so called, it shall be due to the Cathedral. - (s) If having two Parish Churches, (one where he made his Will, the other where he dyed) shall say [I give 100 l. to my Parish Church] without other Distinction; it shall be due to the Parish Church where he dyed, if he dyed an Inhabitant thereof, and would there be Buryed. (t) Otherwise not, say some of the DD. but they are not clear in that Point. (u) Being also much divided in their opinion to which Church the Legacy is due, when the Testator having at the same time, (as well when the Testament was made, as when he dyed.) Two Parish Churches, his House and Habitation in each, dwelling alike indifferently in each, a reputed Parishioner to each, doth Bequeath the said Sum of 100 l. to his Parish Church. To find out the Testators Intention in a Bequest so Circumstantiated, the DD. raise their Conjectures either from the consideration of the Testators choice of the Place for his Enterment, as which of these two Parish Churches he desired to be Buryed in; or from the consideration

Gemin. Rom. Anchor. Franc. & Socin. quos refert & sequitur Boer. in q. 176.

5) Mentoeth. lib. 4. Præf. 114. nu. 6.

of his most frequent converse, as which of these two Parishes he was personally most conversant in; or from the consideration of his Affection to the one more than to the other; and lay the greatest weight upon that where he desired to be Buryed, as being a Signal of his Affection to that Parish Church more than the other, and accordingly give their determination herein. And in Case there be not sufficient Evidence of his Affection more to the one than to the other, the Law presumes the Legacy for that Parish Church which is the poorest of the two; but if that neither can sufficiently appear, then and in such Case the Bishop of the Diocese may gratifie which Parish he please, by Assigning it the whole Legacy; or otherwise may divide it betwixt them both, as he shall think fit. (m) But if the Testator himself Nominates the Church, and there be several Churches of the same Name, and no sufficient Evidence which he meant or intended; in that Case the Law presumes he intended that Church which was the poorest of the Name. (x)

84. When a Testator gives a Legacy to a Man, willing him to live with his Children, the Legacy is extinguish'd upon his not living with them, in Case the Legacy were given him for the Childrens sake. (y) Otherwise if it were given him for his own sake, and not for theirs. (z) But if it were given him on both Respects, viz. For the love the Testator bore him, and that he might live with his Children; in that Case the Legacy shall be good to him, albeit he doth not live with them; because then the favour the Law allows the Legatary, and for prevention of an Extinguishment of the Legacy shall turn the Scale, especially if the Testator had more than an ordinary Affection for him. (a)

85. If the Testator saith, [I would not have my Executor to binder A. B. in his Legacy, or in what I have Bequeathed to him.] The Law doth infer, that A. B. shall take the Thing Bequeathed of his own proper Authority, without expecting the delivery thereof to him by the Executor: (b) Which holds true, albeit the usual words of Bequeathing are omitted. For,

86. In the constitution of a Legacy it is not necessary the Testator should in terminis say, I Give, Leave, Will, Devise, or Bequeath; it is sufficient if he saith, I would have A. B. to have such a Thing, or let my Executor suffer him to have it, or let him see that A. B. have such a Thing] or any other words of like import. (c)

87. He that hath the Letters of Administration cum Testamento annexo, is as far forth obliged to pay the Legacies in such Will contained, as if the Will it self had been legally proved. (d)

m[Tiraq. de jur. primogen. q. 17. no. 16. & loc. in l. quæ Condicio. § cum ita. nu. 4. ff. de cond. & demon. & Menoch. ubi sup. nu. 8.

x] Bald. in l. si quis ad declinandum. C. de Episc. & Cler. & Angel. in §. si quis in nomine. in Auth. de Ecclesiastic. & Auctor. §. Salicet Socin. & alij.

y] l. illis libere. in fin. ff. de cond. & dem. & l. Scia. ff. de annuis Legat. 2] Ita post glo. Bart. & al. in l. 1. C. de Legat. & Decij Conf. 601. nu. 3.

a] Ibid. Dec. nu. 4.

b] Angel. in l. si res. nu. 1. ff. de rei vindic. & Jo. Curer. in l. nemo potest ff. de Legat. 1. §. l. damnas. c. no. ff. de usufruct. Legat. d] Leonicius. tur. de Codicil.

e) l. 3. S. quan-
do autem. ff.
de jur. Filci.

88. If the Legatary be a person capable of a Legacy at the Time of the Testators death, it is sufficient, albeit he were not so at the time when the Testament was made. (e)

f) Jo. Guter. in
l. nemo potest.
ff. de Legat.
1. nu. 500.
post Barr.

89. If a Testator Bequeath 100. Bushels of Corn out of his Ground, there is such a Tacite Condition in that Legacy, that if the Ground produce it not the first Year, the Legatary may expect it the next, and so on successively till the Legacy be compleat. (f)

g) Bald. in l.
fin col. 1. C.
com. de l. &
Lanc. Gauliau-
la. in l. 2. ff. de
verb. oblig.
h) Bald. in l.
voluntatis. in
fin. col. ff. de
fidei commiss.
& Jo. de Bar-
ronibus. sup.
Rub. C. de
secund. Nupt.
nu. 31.

90. A Testator saith, [I give my Physick Books to my Son, if hereafter he shall study Physick; but if he make the Law his Profession, then let him have my Law Books.] After the Son Studies both Law and Physick; in that Case he shall have the Testators Books of both Professions. (g)

91. A Legacy left by the Husband to the Wife so long as she shall abide and remain in his House, is understood as a Legacy given her so long as she continues in her widdowed Condition. (h)

i) l. qui concu-
binam. §. uxori
ff. de Legat. 3.
& Jo. de Bar-
ron. ubi supra.
nu. 32.
k) l. Titia. §. 1.
ff. de Legat. 2.
l) Bald. in Rub.
C. de reb.
Cred. nu. 3.
m) l. Divus. ff.
de usu. & Hab.

92. If the Husband gives a Legacy to his Wife in this manner, viz. Item, I Bequeath 100 l. to my Wife so long as she remain in my House, and with my Goods for my Child till he come of Age; she looeth her Legacy if in the interim she Marry again, and dwell elsewhere with her second Husband. (i)

93. Legacies and Bequests of a Dubious sense, ought to have such Construction as may render them of use to the Legataries. (k) For which Reason, if a Testator Bequeaths his *Debts*, he shall be understood to have Bequeathed his *Credits*, (l) In like manner if he Devise his Wood, or [*Sylva*] it shall be a Devise also of the Fruit or Proceed thereof, That so the Legatary may have power to cut it down, convert it into *Ligna*, and Sell the same; for otherwise the Devise would be nothing worth to the Devisee. (m)

n) l. plenum.
§. equitij ff. de
usu. & hab. &
Jus. in l. si Do-
mus. nu. 6. ff. de
Legat. 1. & l. si
Tervus. §. ult.
ff. eod.

94. When the Testators sense and meaning is somewhat dark and cloudy, it may be Requisite in some Cases to have due Reflections on, or (as the Phrase now currant is) to take their Measures by the Quality of the Legatary; as if the Testator should say, [I allow *A. B.* the use of some of my Horses, until my Executor shall have Sold them.] In that Case, if *A. B.* be a Farmer, he shall not use his Hunting-Horses nor his Coach-Horses, but his Cart-Horses and such only as were employed about his Husbandry Affairs; otherwise & *e contra* if *A. B.* were of a more refined Quality. (n)

95. If the Testator saith, I Bequeath to *A. B.* whatever Debts are made, contracted, and due to me that shall be found at my decease; *A. B.* shall in that Case have only such Debts as were contracted at that Time when the Testament was made, not such

as were afterwards made or contracted: The Reason is, because those latter words, [*which shall be found at my decease*] are not Augmentative but Restrictive as relating to the words precedent, and therefore ought not to work an Extension of that Legacy, least a limiting and diminuting Induction should operate an Augmentation. (o) For if less Debts were found at the Testator's death than had been made to him at or before the making of his will, there could no more pass by this Legacy than such, much less others that were made and contracted afterwards.

96. In like manner, if the Testator Bequeath all his Books to A. B. after Buys many other Books, after makes another Will, wherein he ratifies and confirms the first as to the Legacies therein Bequeathed. Even in this Case A. B. shall not have the Books bought after the making of the first Testament. (p) Because this Confirmation in such latter Will Ratifies nothing to any Extension beyond what is adequate to the Legacy Bequeathed in the former.

97. But if the Testator shall say, *I give A. B. all I can, or whatever I can out of the Goods and Chattels which I have.* In such case, whatever shall be afterwards acquired of that kind by the Testator, is contained in such Legacy, and shall enure to A. B. (q) Otherwise in case the Testator had limited the words of the said Bequest to any certain place. (r)

98. If a Testator saith, [*I Bequeath my things to A. B.*] his Money doth pass by that Bequest, because of its Generality; (s) Otherwise if he saith, [*I Bequeath my Gold and Silver to A. B.*] (t) Because such words are not General enough to be Monies infallible continent, for a Man may have very current Money that is neither Gold nor Silver.

99. A Testator gives 1000 l. to his Daughters, and dies. After his Relict is delivered of another Daughter, by that Husband, Deceased. That Daughter shall share with the other in 1000 l. (u) Otherwise if the Testator had limited the Legacy to any Number of Legatees, and said *I give 1000 l. to my Three Daughters.*

100. A Testator saith, [*I give a Portion of my Estate, or a Portion of my Goods to A. B.*] without expressing specially what proportion. In this Case he shall have the one half or Moity thereof. (w) The same Law in Case the Testator had said, [*I give A. B. part of my Estate, or I give him part of my Goods.*] The Reason is, because a Dimidiety is the most just and equallest part of the whole. (x) And the Case may so happen, as that l. si Titius, ff. de Legat. 3. (y) Brecha. ibid. In Duplo Dimidia dcbetur. l. 3. C. de Legat.

o) Curtius Jun. in Consil. 277. nu. 11, 12. l. p) Rom. sing. 503. & l. si ita, ff. qui dixit, probari. & l. Aurelius. §. Testam. ff. de Libera. Legat. q) l. si ita quis Test. ff. de Leg. 2. & Bart. in l. si ita. nu. 3. ff. de aur. & arg. leg. & Ruin. Conf. 160. nu. 14. lib. 2. & Curt. Jun. in Conf. 109. nu. 18. & Bello. Conf. 5. nu. u. r) Bart. ibid. nu. 5. s) Brechtus in l. 4. ff. de ver. sig. t) Ibid. & l. cum aur. & arg. ff. de arg. & arg. Leg. Rei nomen Pecuniam continet, sed non e contra, licet Pecunia rem significat. Res est Genus, Pecunia species. u) Fornerius. in l. 164. de ver. sig. in prin. & l. qui filius. ff. de Leg. 1. & l. 5. ff. de Test. tut. & l. 5. ff. de oper. lib. w) Brechtus. ubi supra. in l. 164. & l. etiam ff. de usufruct. & l. atate. §. si interrogatus. ff. de Interrog. act. & glo. in

Part shall be taken *Legally* in one sense, as well as *Figuratively* in another *pro toto*; as when a Testator Bequeaths to his Wife that part of his House he most frequented and used to live in, she shall have in that case not only this or that part of the House, as his Bed-chamber, or the like; but the whole of his Habitation that he made use of with and for his Family. (y)

y) Accursius in l. uxori. ff. de Legat. 3. & Brechz. ibid.

z) Fornelius in l. 145. ff. de verb. sign.

a) l. si grege. ff. de Legat. 1.

101. If a Legacy be given between thee and a Child in the Womb, and that Child after happen to be dead born, or never born, thou shalt have the whole to thy self, albeit the Testator Assigned each one his entire proportion thereof. (z)

102. If a Herd of Cattle or a Flock of Sheep be Bequeathed, whereof all of each, save one, do die, the Legatary shall have that one. (a)

b) l. qui chirographum. ff. de Legat. 3. & l. 1. C. de don.

103. By the Request of Bonds or Specialties, the Debts due or to be due thereon, as also the right of Action for the same are Bequeathed. Likewise by the Devise of a Purchase-Deed, the thing Purchased, together with all the Testators Right, Title, and Interest to and in the same doth pass to the Devisee. (b)

c) Alceat. & Fornel. in l. 206. ff. de verb. sign.

d) l. 3. de tritic. ff. de vino & olio Legat.

e) l. quod principi. ff. de Leg. 2. & Bart. Bal. & Castr. in d. locum. & Menoch. lib. 5. Praef. 12 l. 1.

f) glo. in C. quoniam. Abbas. de Offic. de leg.

g) Bald. in Rub. C. de jur. si c. lib. 10. nu. 14. & §. ult. in Auth. Quomo. oper. Episco.

h) Brechzus. in l. 38. ff. de verb. sign.

104. A Bequest of Wines doth convey the Vessels wherein they are to the Legatary, not as if a Man in his Liquor should think (for no Man will) the Vessels were part of the Wines (as Meddals of Gold or Silver are part of such Mettals) but because the Testators intention in the Eye of the Law seems to Bequeath them as Accessories to the Principal; (c) excepting such as by reason of the greatness of their Bulk and wide Capacity, cannot without much difficulty be removed out of the Cellars where they are. (d)

105. If a Legacy be given to the Bishop of such a Diocese, without naming him, and he happen to die before the day for payment thereof come, his Successors shall have it; because it is presumed the Testator intended it not to that person so dignified, but to the Dignity it self. (e) and because the Dignity is not, as the Person, Mortal, but Sempervive by Succession. (f) For the same Reason, a Legacy given to a King (who dies before it becomes payable) accrews to the next Successor, because the Regal Authority never dies. (g) Otherwise. if the Legacy were given to A. B. (by name) Bishop of D. because then the Person, not the Dignity is the Legatary; the Dignity being mention'd only for distinction,

106. If a Legacy be given to the Child in the Womb, and the Birth prove Monstrous, that is, very contrary to the common form and shape of Mankind, as with a Growes Beak instead of a Nose, or with the Face of an Ass instead of a better; in such an ill favoured Case the Legacy is void. (h) Otherwise if it be Born only with some of the less principal Members imperfect or Supernumerary,

as with half a Thumb, or Two Thumbs, or Six Fingers on a Hand, or the like. (i) But if the Birth (not accidentally) be imperfect as to its Integrals, or defective as to its more Noble and more Principal Parts and Members, as having but one Eye, or but one Hand, albeit the Creature hath life the Legacy hath none. (k) For although an Amplification of the natural Form in this Case doth no prejudice, yet a Mutation thereof will. (l) understand not this, as if it did extend to Hermaphrodites: For if they be not in a double Capacity as to Legacies as well as other things, yet they are not excluded a single Capacity; but in that Case it is provided, That that Sex which most prevails with them in Nature, shall likewise prevail in Law, as to the Legacy Bequeathed. (m)

i) l. non sunt liberi. ff. de stat. hom.

k) l. quod dicitur. ff. de lib. & posth. hered. l) dict. l. non sunt liberi.

m) l. quaritur. ff. de stat. hom.

107. To conclude with the *Pope*, because much of the Law that treats of this Subject (if I would have travell'd that way) borders on his Dominions; it is Asserted or Legended (which you please) by a very learned Author, That *Nemo prater Papam potest alterare voluntates Testatorum.* (n) It is nothing strange, that he who assumes a Power to dispose of Souls, should alter the best faculty thereof; for the Wills ~~Society~~ is the Creatures Felicity.

n) Jo. Guterius. test. ff. de Leg. 2.

*Αφθάρτη βασιλεία [πάντων] δόξα εἰς

F I N I S.

as with half a Tunnage, or Two Tunnage, or Six Tunnage, or a
Hind, or the like. (a) But the Birth (not accidentally) be-
ing as to the Legatee, or the devisee, as to its more Noble
and more Beneficial Parts and Members, as having but one In-
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case it is provided, That that in which it prevails with them
in the same shall likewise prevail in Law, as to the Legacy &c.
Quintus (d).
107. To conclude with the Poet, because much of the Law
that treats of this Subject, if I would I could say (that way)
nothing on his Knowledge, is as Affected or Corrupted (which
you find) by a very learned Author, That Most Excellent
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108. To conclude with the Poet, because much of the Law



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